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MAKING EXECUTIVE PRIVILEGE WORK: A MULTI-FACTOR TEST IN AN AGE OF CZARS AND CONGRESSIONAL OVERSIGHT

KENNETH A. KLUKOWSKI*

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I. INTRODUCTION

Political gridlock sometimes forces the federal judiciary to resolve a number of disputes between the other two branches of government. When held by opposite parties, Congress and the White House occasionally engage in political battles that turn on questions of law, and therefore spill over into the courts. Eventually, these conflicts between the political branches force the judicial branch to revisit its doctrine of executive privilege, exploring uncharted constitutional waters. As recent years have often seen a President of one party and Congress held by the opposition party, an examination of executive privilege doctrine proves timely and useful to the judiciary.

Executive privilege conflicts are almost unavoidable in times of heightened partisan conflict. Congressional oversight of the executive has been part of American constitutional government since George Washington. Congress requires information to perform its constitutional oversight role when formulating legislation and in order to responsibly appropriate funds for current and ongoing government operations. Concurrently, the President must withhold certain information to properly execute his constitutional duties, given that disclosure of some information would harm the national interest. All other information, however, should be divulged in a free and open society where the government answers to the people. When information is sought through compulsory means, either by Congress or the courts, executive privilege is the doctrine that shields sensitive information from disclosure to protect the nation's interests, while assuring the disclosure of the remainder.

In the past eighteen years, opposition Congresses controlled by both parties have aggressively investigated the White House. In the 1990s, the Republican Congress

investigated Democratic President William Jefferson Clinton on myriad issues, culminating in the impeachment of a sitting President when President Clinton lied under oath in answering questions regarding his personal life, questions of an admittedly embarrassing nature. In subsequent years, a Democratic Congress investigated Republican President George W. Bush on matters at the core of the President's constitutional powers. Several U.S. attorneys—political appointees that serve at the pleasure of the President—were replaced by the White House. Two committees in the House of Representatives and one committee in the Senate investigated this and other matters, demanding to know what the President of the United States discussed privately with his immediate advisers about these decisions involving the President's appointment power. These committees subpoenaed three senior presidential aides in the White House—as well as the attorney general—to obtain information regarding these presidential conversations. The President asserted executive privilege to prevent the disclosure of these conversations, and several of these matters subsequently went before the courts.

The presidency of Barack Obama is proving at least as contentious as its two immediate predecessors. Republicans lacked the legal authority to subpoena administration officials during 2009 and 2010—a consequence of being in the minority in both chambers of Congress. Republicans, however, won 63 House seats in the 2010 midterm elections, thereby regaining majority status in the House, with committee chairmanships and compulsory power attending that status. (This could likewise be the case after the next election, possibly with the Senate as well.) With this changing of the guard, the nation may well again witness political brinksmanship over access to information involving the President and his subordinates.

This conflict over information has been building for decades. Fourteen years ago, one writer noted that “[o]ver the past two decades, Congress and the President have engaged in increasingly bitter constitutional warfare over access to information. Two implicit constitutional doctrines have collided in these episodes: executive privilege and congressional investigatory power.”¹ The situation has only become more acrimonious and adversarial in subsequent years. The Constitution empowers Congress to engage in vigorous oversight actions over legislative matters and also over executive actions performed by, or involving, congressionally-created offices and Senate-confirmed officers. The Constitution also contemplates an energetic and independent chief executive, separate and distinct from Congress, and entitled to private deliberations within the White House on the President's performance of his constitutional duties and exercise of those powers textually committed to him. Recent years have upset this interbranch balance of powers, muddying the constitutional waters and unmooring current practice from the Framers' design. Therefore, a clear ruling on the applicability of executive privilege would be helpful to clarify the proper boundaries of legislative oversight and restore normative interbranch relations.

¹ Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 632 (1997); accord Stephen C. N. Lilley, *Suboptimal Executive Privilege*, 2009 BYU L. REV. 1127, 1128 (2009) (“Few separation of powers issues have been as consistently contentious over the last fifty years as the existence, scope, and proper use of executive privilege . . .”).

The courts must resolve such controversies when properly presented in an Article III context. Leaving conflicts unresolved only results in additional litigation and political gridlock. It is exceedingly difficult for a court to formulate and apply standards to resolve clashes between the political branches.² Yet, when the political branches reach an impasse in a situation that turns on a question of constitutional law, the courts should resolve the issue if properly presented in a justiciable case once these issues reach a tipping point. Indeed, when the courts refuse to engage in a controversy wherein jurisdiction is proper out of a reluctance to become enmeshed in a political matter, that too threatens the courts' legitimacy by giving the appearance of a dereliction of duty.³ The judiciary should find that executive privilege bars Congress from compelling testimony from senior presidential advisers in the White House regarding their conversations with the President concerning the President's use of a power explicitly granted to him in the text of the Constitution. But the Court must not allow so-called "czars" in the White House to enjoy any confidentiality not afforded to Senate-confirmed department officers, when those "czars" exercise anything resembling operational management of government activities. Allowing Congress to force disclosure when executive privilege properly applies violates the separation of powers, and therefore, the Constitution protects the confidentiality of such conversations. But allowing the President to refuse disclosure when helpful for proper oversight likewise violates the separation of powers, and therefore, the Constitution does not countenance such refusals. A decision delineating this distinction should improve interbranch relations by clarifying each branch's constitutional role.

This Article begins in Part II by exploring a recent executive privilege case between the White House and Congress. Part III then explains the constitutional rationale for executive privilege by surveying the tension between Congress's Article I powers and the President's Article II powers. Part IV then explains modern executive privilege doctrine and the different forms of executive privilege, and also proposes a new multi-factor analysis to be incorporated into the current test. Part V moreover explains why the courts should reject both branches' arguments on these issues in favor of a third approach. Part VI then ends with the long-term implications of executive privilege.

II. CONTEMPORARY CONTROVERSIES IMPLICATE EXECUTIVE PRIVILEGE

When the White House and Congress are held by opposite parties, conflicts can erupt over access to information. One such recent conflict resulted in litigation against two former officials serving under President George W. Bush—White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten.

In 2006, the Justice Department requested and received the resignations of nine U.S. attorneys.⁴ The House Committee on the Judiciary began an investigation into the replacing of these prosecutors,⁵ alleging that replacing these prosecutors seemed

² *United States v. AT&T (AT&T I)*, 551 F.2d 384, 394 (D.C. Cir. 1976).

³ *See Lilley*, *supra* note 1, at 1160-61.

⁴ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 57 (D.D.C. 2008).

⁵ *Id.* at 55, 57.

suspicious.⁶ In doing so, they began seeking documents and testimony from officials at the White House, including senior White House staff who communicate directly with the President of the United States.⁷ The White House offered documents containing communications between presidential advisers, the Justice Department, and also between those advisers and congressional members and staffers.⁸ Rejecting these, the Judiciary Committee made clear that it sought internal White House communications involving the President.⁹ The Committee Chairman John Conyers and the relevant Subcommittee Chair Linda Sanchez began a series of demand letters to which White House Counsel Fred Fielding, writing for President George W. Bush, repeatedly refused to allow senior aides in the White House to testify under oath before the Committee.¹⁰ Although each side offered various accommodations, neither found the other's offers acceptable.¹¹

After the last offer and counteroffer were rejected, the committee subpoenaed Miers and Bolten for information regarding replacing the U.S. attorneys in question.¹² Acting Attorney General (and Solicitor General) Paul Clement, as well as the Justice Department's Office of Legal Counsel, both advised the President that these testimony and documents were protected by executive privilege.¹³ The President then asserted executive privilege, directing Miers and Bolten not to comply with the subpoenas.¹⁴

The House Judiciary Committee voted to hold Joshua Bolten and Harriet Miers in contempt for refusing to testify, and formally reported the matter to the full House for action.¹⁵ The full House voted to hold Bolten and Miers in contempt of Congress, and authorized the House Judiciary Committee, under Chairman John Conyers, to file a civil suit on behalf of the House to seek a federal court to order Bolten and Miers to comply with the House subpoena.¹⁶ Speaker Nancy Pelosi then certified that result pursuant to 2 U.S.C. § 194, referring the contempt citation to the

⁶ *Id.* at 57. During the course of this investigation, over 7,850 pages of information was provided to the committee, and a number of administration officials testified. *See id.* at 58-59. The committee found the testimony of several officials, such as former Attorney General Alberto Gonzales, to be inconsistent, and investigated further. *Id.* at 59.

⁷ *Id.* at 61-62.

⁸ *Id.* at 60 (citing Pl.'s Mot. Ex. 5).

⁹ *Id.*

¹⁰ *Id.* at 59-61.

¹¹ *See id.*

¹² *Id.* at 61. On June 13, 2007, the House Judiciary Committee issued subpoenas to White House Counsel Harriet Miers to produce documents and offer sworn testimony regarding replacing the U.S. attorneys, and to White House Chief of Staff Joshua Bolten to provide any such documents in his possession. *Id.*

¹³ *Id.* at 61-62.

¹⁴ *Id.* at 62.

¹⁵ *Id.* at 63; H.R. REP. NO. 110-423, at 1 (2007).

¹⁶ H.R. Res. 979, 110th Cong. (2008); H.R. Res. 980, 110th Cong. (2008); H.R. Res. 982, 110th Cong. (2008).

U.S. Attorney for the District of Columbia for criminal prosecution.¹⁷ Attorney General Michael Mukasey replied to Speaker Pelosi that he found the assertion of executive privilege proper, and therefore, he would not have the U.S. attorney bring prosecutions.¹⁸ The House, through Chairman Conyers, then filed suit pursuant to a House Resolution passed concurrently with the contempt citations.¹⁹ The parties then presented the executive privilege in their respective pleadings to the U.S. District Court for the District of Columbia,²⁰ where Judge Bates denied the motion to dismiss and allowed the suit to move forward on July 31, 2008.²¹

Although the question of standing will be addressed in more detail later, the district court in *Miers* found that Congress has standing.²² The *Miers* court found that Congress filed suit to vindicate both its right to information and its right to have subpoenas enforced,²³ and that either of these grounds satisfies the injury-in-fact requirement for standing.²⁴ The district court therefore proceeded to the merits of the case, and the D.C. Circuit is likely to do the same both in this case and in additional cases should they be brought. Such holdings carry sufficient promise that increased litigation and corresponding assertions of executive privilege are likely features of congressional oversight for the foreseeable future. Therefore, examining the meaning and application of executive privilege is timely and helpful.

Other situations from the previous administration either resulted in, or at least contemplated, litigation. There was an investigation involving former White House Senior Adviser Karl Rove, concerning the same circumstances as the *Miers*/Bolten situation, that led to congressional subpoenas and contempt proceedings.²⁵ Another situation involved former Attorney General Michael B. Mukasey, in which the identity of a Central Intelligence Agency employee, Valerie Plame, was made public

¹⁷ Under federal statute, the Speaker of the House certifies a contempt citation to the U.S. Attorney for the District of Columbia, "whose duty it shall be to bring the matter before the grand jury for its action." 2 U.S.C. § 194 (2006).

¹⁸ Letter from Michael B. Mukasey, U.S. Att'y Gen., to Nancy Pelosi, Speaker of the House of Representatives (Feb. 29, 2008) (on file with author).

¹⁹ H.R. Res. 980, 110th Cong. (2008).

²⁰ Mem. of Points & Auths. in Supp. of Pl.'s Mot. for Partial Summ. J., Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 1:08-cv-00409); Mem. of Points & Auths. in Supp. of Defs.' Mot. to Dismiss & in Opp'n to Pl.'s Mot. for Partial Summ. J. on Counts I & II, *Miers*, 558 F. Supp. 2d 53 (No. 1:08-cv-00409).

²¹ *Miers*, 558 F. Supp. 2d at 108.

²² *Id.* at 78.

²³ *Id.*

²⁴ *Id.*

²⁵ This Senate Judiciary Committee subpoenaed Rove to testify regarding the same U.S. attorney situation. See Paul Kane, *Rove, Bolten Found in Contempt of Congress*, WASH. POST, Dec. 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301736.html>. Once again, President Bush asserted executive privilege, and the committee voted to hold Rove in contempt and refer the matter to the full U.S. Senate on December 13, 2007. *Id.* The House Judiciary Committee later voted to act likewise and referred the matter to the full House on July 30, 2008. Associated Press, *Rove could be held in contempt of Congress*, MSNBC.COM, July 30, 2008, <http://www.msnbc.msn.com/id/25932226/>.

by a newspaper story discussing pre-war intelligence on Iraq.²⁶ The investigation that followed resulted in a criminal conviction,²⁷ though the prison sentence for that conviction was commuted²⁸ and the civil suit arising from these facts was dismissed.²⁹ The House Committee on Oversight and Government Reform, through Chairman Henry Waxman sought documents regarding this disclosure,³⁰ subpoenaing Justice Department records of interviews with President George W. Bush and Vice President Dick Cheney discussing the matter.³¹ Executive privilege was asserted regarding those documents, and so Mukasey refused to deliver them to the committee.³² The House Judiciary Committee consequently considered holding Attorney General Mukasey in contempt of Congress and referring the matter to the full House.³³

With these and future situations, one investigative duration should also be noted. The House, unlike the Senate, is not a continuous body.³⁴ House subpoenas, therefore, expire on January 3 of every odd-numbered year when a new Congress is called into session following each congressional election. Senate subpoenas, by contrast, do not expire. Also, although a President can continue to assert executive privilege after he leaves office,³⁵ the vitality of that privilege lessens at that time.³⁶ The case law does not explain precisely what the limits of that privilege then become.

²⁶ See Robert Novak, Editorial, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

²⁷ Chief of Staff to the Vice President Scooter Libby was convicted for, inter alia, perjury and obstruction of justice on March 6, 2007. *United States v. Libby*, 498 F. Supp. 2d 1, 2 (D.D.C. 2007).

²⁸ Libby's prison sentence was commuted by President George W. Bush. *United States v. Libby*, 495 F. Supp. 2d 49, 51 (D.D.C. 2007).

²⁹ *Wilson v. Libby*, 535 F.3d 697, 713 (D.C. Cir. 2008), *aff'g* 498 F. Supp. 2d 74 (D.D.C. 2007) (dismissing the case).

³⁰ Jason Ryan, *Attorney General Threatened with Contempt of Congress over CIA Leak Documents*, ABCNEWS.COM, July 8, 2008, <http://www.abcnews.go.com/TheLaw/story?id=5333956>.

³¹ *Id.*

³² *Id.*

³³ See 154 CONG. REC. D1134-35 (daily ed. Sept. 22, 2008). All of these incidents were also cited in a resolution seeking the impeachment of the former President. See H.R. Res. 1258, 110th Cong., art. XXVII (2008).

³⁴ *AT&T I*, 551 F.2d 384, 390 (D.C. Cir. 1976).

³⁵ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) ("[Executive] privilege survives the individual President's tenure."). One author argues that executive privilege should not outlast a president's term. See Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 304 (2009).

³⁶ See Sacharoff, *supra* note 35, at 305.

III. THE CONSTITUTIONAL RATIONALE FOR EXECUTIVE PRIVILEGE

Executive privilege is necessary to the tripartite system of American constitutional government. Both of the political branches—the legislative and the executive—are vested with broad powers.³⁷ Having separate, coequal branches, at times elected by different parties with different—even incompatible and sometimes adverse—agendas inevitably causes clashes between separate actors that nonetheless must interface and work together on a daily basis for the federal government to function. But this process can be slow. “The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the Separation of Powers.”³⁸ Thus, it is expected that the two political branches will at times come into conflict, and a way to resolve the conflict is needed.

When such conflicts concern information, executive privilege becomes an issue. Both legislative action and executive action require information. The executive is in a superior position to obtain that information, as there is a military and intelligence apparatus serving under the President that is essential to dealing effectively with—and being prepared for—the dangers that any nation faces in an imperfect world.³⁹

The origins of executive privilege in the United States can be traced to the founding of the republic, and has continued to the present day. President Washington made clear in 1792 that he reserved the right to withhold from Congress his cabinet deliberations when considering how to respond to the failed efforts of a military action led by Major General St. Clair in Ohio.⁴⁰ Washington then asserted executive privilege again in refusing to disclose details regarding the formulation of the Jay Treaty.⁴¹ Shortly thereafter in *Marbury v. Madison*, the Supreme Court stated that the cabinet official whose actions were being examined (Secretary of State James Madison) did not need to disclose anything confidentially communicated to him by the President,⁴² although the Court went on to find that the known facts of the *Marbury* case were clearly not of a confidential nature.⁴³ Every President since Dwight D. Eisenhower has asserted executive privilege to varying extents, or at minimum taken efforts to express that he retains the right to assert it.⁴⁴

³⁷ See U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1.

³⁸ *United States v. AT&T (AT&T II)*, 567 F.2d 121, 133 (D.C. Cir. 1977).

³⁹ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936) (dictum).

⁴⁰ Lilley, *supra* note 1, at 1133 (citing LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 10-11 (2004)).

⁴¹ *Curtiss-Wright*, 299 U.S. at 320-21 (dictum); see also FISHER, *supra* note 40, at 35-36.

⁴² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 144-45 (1803) (dictum).

⁴³ *Id.* at 144, 170 (dictum). At issue in *Marbury* was the failure of the Secretary of State to deliver a signed copy of a D.C. municipal judicial commission to William Marbury. *Id.* at 138-39.

⁴⁴ Lilley, *supra* note 1, at 1133-34 & nn.13-20 (citing MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 39, 41, 54-119, 122, 147-54 (2d ed. 2002)).

“The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.”⁴⁵

This does not mean that Congress is powerless to obtain information. There are certainly other tools that Congress can utilize in attempting to motivate the executive to divulge information. The power to withhold confirmations of presidential nominations is one of the most obvious examples, but that power is wielded only by the Senate.⁴⁶ The primary tool the House has to encourage executive cooperation is the appropriations process. While one may assume that this power was never intended to be used to relentlessly badger or coerce the executive branch, there is evidence from the time of the Framing that the power of the purse was always intended as a powerful tool in interbranch relations.⁴⁷ Requesting or demanding information is only one option open to Congress as it seeks to fulfill its oversight responsibility, and executive privilege is the counterweight to that in our constitutional framework.

A. Collision of Constitutional Forces Between Coequal Political Branches

The allocation of powers between separate and coequal branches predictably causes challenges. Congress regularly holds hearings to conduct oversight of executive branch agencies. This oversight consists of probing how the President’s executive power is being exercised in those departments and agencies. Congressional hearings are designed to elicit information. Some of that information from the executive is of a nature that the executive seeks to keep confidential, and the D.C. Circuit has held that there is a “‘great public interest’” in safeguarding the confidentiality of the President’s conversations concerning his official duties.⁴⁸ Thus, executive privilege must accommodate the legitimate needs that both branches have regarding information, recognizing “the fundamental constitutional principle that ‘[t]he power to make the necessary laws is in Congress; the power to execute in the President.’”⁴⁹

1. Congressional Oversight

Much of the confusion over the scope of executive privilege proceeds from the ambiguous nature of congressional oversight. Congressional investigations have been part of American government since 1792.⁵⁰ With the exception of certain enumerated quasi-executive functions of the Senate such as confirmations,⁵¹ the only

⁴⁵ *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61 (1982).

⁴⁶ U.S. CONST. art. II, § 2, cl. 2.

⁴⁷ *E.g.*, THE FEDERALIST NO. 58 (James Madison).

⁴⁸ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 729-30 (D.C. Cir. 1974) (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)).

⁴⁹ *Medellin v. Texas*, 552 U.S. 491, 526 (2008) (alteration in original) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006)).

⁵⁰ Matthew Mantel, *Congressional Investigations: A Bibliography*, 100 LAW LIBR. J. 323, 324 n.8 (2008).

⁵¹ U.S. CONST. art. II, § 2, cl. 2.

clear purpose of the legislative branch is to legislate.⁵² Yet, there is some historical support for the argument that Congress has an investigative role beyond its strictly legislative function. George Mason made the comment that members of Congress “possess inquisitorial power[] . . . to inspect the Conduct of the public offices”⁵³ beyond their role as legislators. And a century later Woodrow Wilson argued that “[q]uite as important as legislation is vigilant oversight of administration.”⁵⁴ The Supreme Court resolved this issue when it declared that Congress has a constitutional power to conduct oversight of the executive branch,⁵⁵ as “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁵⁶ Otherwise stated:

[F]or Congress to be able effectively to perform any of its functions—ranging from legislating, to overseeing administrative agencies, to impeaching, to judging the elections, returns, and qualifications of its members—it must have access to information. If those in possession of the necessary information could not be made to give it up, then Congress would have at its disposal only the information that witnesses wanted it to have—hardly an effective means of carrying out its functions.⁵⁷

A great deal of oversight hearings are essentially supervisory in nature, rather than in contemplation of possible legislation. Even if the Senate properly has a supervisory power incidental to its confirmation power, there is no such justification regarding the House. Although some could argue that Congress has a legitimate role in ensuring that legislation is properly implemented,⁵⁸ there is no explicit textual basis in the Constitution for such an argument, and in fact the constitutional text speaks against this by charging the President—not Congress—with taking care that the laws are properly executed.⁵⁹ If Congress is overseeing with a watchful eye to consider whether remedial legislation is warranted, such a motivation would be within the legislative ambit of Article I. But if a House committee readily acknowledges that it is not exploring possible legislation, then, except for the appropriations power discussed below, there is no constitutional foundation for such hearings absent an inherent interrogatory power.

⁵² See *id.* art. I, § 1.

⁵³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1966).

⁵⁴ WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 297 (The Riverside Press 1901) (1885).

⁵⁵ See *Watkins v. United States*, 354 U.S. 178 (1957).

⁵⁶ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

⁵⁷ Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1143-44 (2009) (footnote omitted).

⁵⁸ There are statutes that suggest Congress has such a legally-cognizable interest. See, e.g., 2 U.S.C. § 288e(a) (2006) (granting the Senate a right to intervene in litigation “in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue”). This would also explain why, when the Attorney General decides to discontinue or refrain from defending the constitutionality of an act of Congress in litigation, the Attorney General must inform Congress of that decision. See 28 U.S.C. § 530D (2006).

⁵⁹ U.S. CONST. art. II, § 3.

“Congress’s power to monitor executive actions is implicit in the appropriations power.”⁶⁰ While it is perhaps reasonable that the Appropriations Committee would hold hearings on a regular basis to assess the monetary resources it wished to allocate to a given agency, it is unclear what role committee hearings play in the constitutional process aside from that. But the question of what information Congress is entitled to begs the question of where the constitutional contours of oversight lie. How much is required or suggested by the Constitution, versus what has simply become accepted practice over time? Although longstanding practice is not the touchstone of constitutionality,⁶¹ the ubiquity of congressional oversight since the Framing strongly suggests that it was contemplated as part of the constitutional design. While constitutional silence on oversight (again, beyond the implications of appropriations) leaves a great deal of ambiguity, sufficient authority exists to form a cogent constitutional doctrine.

Congressional investigations have an essential role in the tripartite system of government to hold the government accountable to the people through its elected representatives. Congress is the “grand inquest of the state.”⁶² This inquest is held in the form of hearings. The Supreme Court has held that “the constitutional provisions which commit the legislative function to the two houses [of Congress] are intended to include [oversight inquiries] to the end that the function may be effectively exercised.”⁶³ This information-gathering process is necessary because “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁶⁴ Of particular interest in the current situation, it should be noted that if Congress finds a person in contempt, it actually has the power to order its Sergeant-at-Arms to arrest and physically incarcerate that person.⁶⁵ It has never attempted to utilize that statute to arrest a White House official.⁶⁶ The prospect of doing so has been called “unseemly,”⁶⁷ which is a bit of an understatement, as it may be unconstitutional.⁶⁸

The courts have found a constitutional foundation to oversight apart from the appropriations process. Congress’s subpoena power is partially derived from the Speech or Debate Clause.⁶⁹ The D.C. Circuit acknowledged that in the *Eastland* case the Supreme Court held that the Speech and Debate Clause forbids courts from

⁶⁰ *AT&T I*, 551 F.2d at 394 (D.C. Cir. 1976).

⁶¹ See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (finding that a practice maintained since the Framing, while evidence of constitutionality, is not dispositive).

⁶² 1 THE WORKS OF JAMES WILSON 415 (Robert Green McCloskey ed., 1967).

⁶³ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

⁶⁴ *Id.* at 174.

⁶⁵ E.g., *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

⁶⁶ Resp. to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 Op. O.L.C. 68, 86 (1986).

⁶⁷ Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 78 (D.D.C. 2008).

⁶⁸ See *id.*

⁶⁹ U.S. CONST. art. I, § 6, cl. 1 (“[F]or any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place.”).

interfering with congressional subpoenas if those subpoenas concern a legitimate area of congressional investigation.⁷⁰ But the circuit court then reasoned that “*Eastland* immunity is not absolute in the context of a conflicting constitutional interest asserted by a coordinate branch of the government,”⁷¹ noting that the Supreme Court had previously stated in dictum that congressional subpoenas are not enforceable if there is a “need to protect military, diplomatic, or sensitive national security secrets.”⁷² The court then qualified that statement, stating that “[a]lthough Congress may delegate its investigatory and subpoenaing power to its committees and subcommittees, the assertion of this power against an executive claim of excessive risk to national security is clearly stronger when ratified by a similar plenary vote of the House.”⁷³

This necessity for investigations includes congressional hearings for the Department of Justice and its functionaries. The Court has stated that “administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected . . . [is] one on which legislation could be had and would be materially aided by the information which [Congress’s] investigation [can provide].”⁷⁴ Legislation is annually enacted for the Justice Department, and therefore, oversight hearings for the Department are not only permissible, they are necessary for good government.

It goes without saying that congressional oversight would be a farce without information. Congress starts at a disadvantage; the executive branch has all of the information regarding its operations, and those with the information answer to superior executive branch officials in upward lines of authority that eventually end with the President. Every President understands that the less scrutiny administrative action receives from a coequal branch, the more freedom the President has to act; oversight creates political pressures that constrain the President’s actions.

Therefore, Congress’s subpoena power is essential to oversight. Thus:

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.⁷⁵

So it was understood long before Watergate that congressional subpoenas are sometimes the most effective instrument for Congress to fulfill its oversight duties. As the district court in *Miers* stated, “[s]o long as the Committee is investigating a matter on which Congress can ultimately propose and enact legislation, the Committee may issue subpoenas in furtherance of its power of inquiry.”⁷⁶

⁷⁰ *AT&T I*, 551 F.2d 384, 391 (D.C. Cir. 1976) (citing *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975)).

⁷¹ *Id.*

⁷² *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

⁷³ *Id.* at 393 n.16.

⁷⁴ *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

⁷⁵ *Watkins v. United States*, 354 U.S. 178, 187-88 (1957).

⁷⁶ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 77 (D.D.C. 2008).

There are of course limits to what Congress can do in seeking to obtain information. Congress cannot violate constitutional principles in seeking testimony from witnesses.⁷⁷ The limits on congressional power to seek information through compulsory means must therefore be carefully examined because “a congressional committee’s right to inquire is ‘subject to’ *all* relevant ‘limitations placed by the Constitution on governmental action.’”⁷⁸ The Bill of Rights provides some of those limits,⁷⁹ but those are in the context of Congress investigating a private individual,⁸⁰ and therefore do not apply to congressional oversight of administration personnel regarding their official activities.

Beyond limits to the procedures and tactics that Congress may employ, there are also limits to the proper scope of congressional investigations. The Supreme Court has found that “[a]lthough [Congress’s] power to investigate is necessarily broad it is not unlimited.”⁸¹ Article I does not vest Congress with a right to obtain information *per se*, “but rather merely establishes the general power to perform Congress’s legislative function.”⁸² Conversely, a “generalized interest of presidential confidentiality, without more, [does not preclude] discovery of presidential conversations in civil litigation.”⁸³ That is to say, the Constitution grants Congress only “such limited power of inquiry” to aid in its legislative function.⁸⁴ Thus, inquiries unnecessary for legislative action are not constitutionally founded.⁸⁵ It must be kept in mind that Congress, no different from any governmental entity, can succumb to the temptation to exercise power beyond its right to investigate matters that lie outside its purview.

For example, the Senate committee at the heart of the litigation during Watergate was expressly created by the Senate to investigate “illegal, improper or unethical activities” concerning the 1972 presidential election to determine whether new legislation was needed to protect the integrity of the process for future elections.⁸⁶ There was thus an explicit legislative goal in the oversight process. It was not simply inquiring.⁸⁷

⁷⁷ *Watkins*, 354 U.S. at 188.

⁷⁸ *Hutcheson v. United States*, 369 U.S. 599, 610 (1962) (quoting *Barenblatt v. United States*, 360 U.S. 109, 112 (1959)).

⁷⁹ *Quinn v. United States*, 349 U.S. 155, 161, 164-65 (1955).

⁸⁰ *See id.* at 157-58.

⁸¹ *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 n.15 (1975).

⁸² *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 67 (D.D.C. 2008).

⁸³ *Dellums v. Powell*, 561 F.2d 242, 245-46 (D.C. Cir. 1977).

⁸⁴ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

⁸⁵ *See Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

⁸⁶ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d. 725, 726 & n.2 (D.C. Cir. 1974) (quoting S. Res. 60, 93d Cong. § 1(a) (1973)).

⁸⁷ It would be naïve to suggest, however, that Congress is above using a contemplation-of-legislation rationale as a pretext to delve into executive affairs. It is not possible to remove politics from political bodies.

Those seeking to compel testimony could broadly argue that the Supreme Court has stated that the power to compel witnesses is “necessary to the effective functioning of [our] courts and legislatures,”⁸⁸ as the *Miers* district court noted.⁸⁹ But that statement proves too much. It is simply a statement of general principle—an axiom—that being able to get truthful information is, as a general matter, essential to our governmental processes. But the controversies involving executive privilege are about how to balance legitimate needs for information with the President’s legitimate need to candidly discuss official matters with those assigned to advise him.

2. Executive Power of the President

The executive power of the federal government is vested in the President,⁹⁰ and this provides the counterweight to congressional power that necessitates executive privilege. The concept of inherent executive power is necessarily difficult to define, leading many to suggest theories of how courts can fashion rules to evaluate assertions predicated on such inherent constitutional authority,⁹¹ which is part of the foundation of executive privilege.⁹² Although “[n]owhere in the Constitution . . . is there any explicit reference to a[n executive] privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”⁹³

This is because of the President’s need to obtain information and expertise that he does not personally possess, a need due to the complexity and variety of national policy issues the President must consider. A modern President must make decisions ranging from diplomatic relations with various nations, to military matters, to national security threats, to domestic concerns from taxes, to education, to the environment, to healthcare. For all these concerns, the President requires expert advice. “The President . . . must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.”⁹⁴

It necessarily follows that the President’s ability to confer with his senior advisers “is surely an important condition to the exercise of executive power.”⁹⁵ The President must be able to assess the wisdom (or lack thereof) of proposed legislation

⁸⁸ *United States v. Bryan*, 339 U.S. 323, 331 (1950).

⁸⁹ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008).

⁹⁰ U.S. CONST. art. II, § 1, cl. 1.

⁹¹ See, e.g., Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 887-95 (1983).

⁹² It should be noted, however, that some disagree on whether this executive power is divisible, removing some of it from the exclusive control of the President. Compare Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing in favor of a unitary executive), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing against a unitary executive). See also *Morrison v. Olson*, 487 U.S. 654, 697-718, 727-34 (1988) (Scalia, J., dissenting) (arguing in favor of a unitary executive).

⁹³ *United States v. Nixon*, 418 U.S. 683, 711 (1974).

⁹⁴ *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997).

⁹⁵ *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993).

when deciding whether to sign or to veto,⁹⁶ and for existing law he must take care that those laws are faithfully executed.⁹⁷ If the President must act, and such actions necessarily rely on expert advice, then the power to consult is concomitant with the power to execute.

There is a clear analogue with Congress. The Supreme Court has held that the protections members of Congress enjoy regarding their immunity from liability or legal process for things said in the course of their official legislative deliberations extend to their staffs.⁹⁸ It must be acknowledged that congressional members have the express protection of the Speech and Debate Clause,⁹⁹ while there is no corresponding provision in Article II for the President. But this does not negatively imply that no such protection exists, because Article I enumerates the powers and limitations of Congress with great particularity, while Article II sets forth broad grants of authority without as much detailed specification. This is to be expected if the Framers shared the view expressed in *The Federalist* that Congress is the branch of the federal government most perilous to freedom,¹⁰⁰ in that it becomes all the more important to then commit congressional limits to writing.¹⁰¹ And so the lack of such a clause in Article II does not imply that the protection for legislators just mentioned does not exist for the executive, or for that matter, the courts. And indeed, the courts do enjoy protection very similar to that enjoyed by members of Congress.¹⁰²

Those seeking broad congressional oversight of the President may quote Justice Jackson's statements that:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.¹⁰³

It is important, however, not to take Jackson's statements too far beyond the facts he was considering. In *Youngstown*, President Truman had ordered the federal government to take control of the nation's steel manufacturing facilities and did so

⁹⁶ See U.S. CONST. art. I, § 7, cl. 3.

⁹⁷ *Id.* art. II, § 3.

⁹⁸ *Gravel v. United States*, 408 U.S. 606 (1972).

⁹⁹ U.S. CONST. art. I, § 6, cl. 1.

¹⁰⁰ See THE FEDERALIST NO. 48 (James Madison) ("[I]n a representative republic . . . it is against the enterprising ambition of this [branch of government] that the people ought to indulge all their jealousy and exhaust all their precautions.").

¹⁰¹ This sentiment of the danger of congressional power further undercuts the argument that executive privilege disputes should always be resolved in Congress's favor, rather than be adjudicated.

¹⁰² *Stump v. Sparkman*, 435 U.S. 349 (1978).

¹⁰³ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

without congressional authorization.¹⁰⁴ The Court was dealing with the President making national policy of a sort that required legislation, and Justice Jackson was arguing that a President can only enact policy unilaterally and against legislative will if it is derived directly from his constitutional authority. Although applicable in situations where Congress is passing bills, *Youngstown* is inapposite when there is no promulgation of national policy requiring legislation. This is about the President receiving advice. Although the Constitution's lack of express mention of executive privilege suggests that Congress has more latitude in pressing the issue,¹⁰⁵ the preponderance of case law referencing the constitutional purposes served by executive privilege should sufficiently distinguish it from policymaking per se that the President has a protected interest in maintaining confidentiality.

3. Executive Privilege Is Necessary at the Intersection of Separated Powers

Thus, the President has an enormous need to receive the most frank and direct advice and information possible, which requires some assurance of confidentiality. One author (who investigated a President on behalf of Congress) asks, "[D]oes the interest in encouraging full and frank communications provide a substantial reason for shielding presidential deliberations from outside scrutiny?"¹⁰⁶ The Constitution answers that question in the affirmative. "If presidential advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious considerations of novel or controversial approaches to presidential problems."¹⁰⁷ The D.C. Circuit has acknowledged that "wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch."¹⁰⁸ The prospect of public disclosure would have a chilling effect on the advice given to the President.¹⁰⁹

In a democratic system, there is a cost that attends government secrecy. "Maintaining the confidentiality of deliberations . . . erodes public trust and confidence in government. It fuels speculation that government officials have something to hide. And even when officials reach decisions in a manner consistent with public ideals and aspirations, it impairs the public's ability to confirm that that is true."¹¹⁰ Despite the veracity of that assertion, confidentiality is nonetheless often necessary. If the President is approached through an intermediary with a possibility to serve as an interlocutor to open a channel of communication between two nations heading toward war, such information is extremely sensitive and disclosing it could lead to the loss of many lives. More central to America's national interests, if the President is conferring with a top military commander about a covert operation

¹⁰⁴ *Id.* at 582.

¹⁰⁵ *Cf.* *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-67 (1989).

¹⁰⁶ Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 200 (2008).

¹⁰⁷ *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997).

¹⁰⁸ *Nixon v. Sirica*, 487 F.2d 700, 715 (D.C. Cir. 1973).

¹⁰⁹ *Cf.* *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (reasoning that the prospect of public disclosure of membership in an organization devoted to civil rights for African-Americans would have a chilling effect on recruiting and retaining members).

¹¹⁰ Lee, *supra* note 106, at 203-04.

involving U.S. forces in a hostile country, forced disclosure of that conversation could cost American troops their lives and possibly plunge the United States into war. It is patently absurd to suggest that the Constitution does not protect the ability of the commander-in-chief and diplomatic head of state to engage in protected conversations when such issues are implicated. The Constitution is not a suicide pact,¹¹¹ either for individual Americans or for the republic itself in a dangerous world.

Hence, executive privilege is necessary. The purpose of executive privilege covering presidential communications is to encourage candid discussions:

The expectation of a President to the confidentiality of his conversations and correspondence . . . [arises from] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.¹¹²

Policy discussions sometimes require blunt assessments of the ramifications for proposed courses of action. Some alternatives have possible consequences that need to be explicated in stark terms to ensure that the President appreciates their gravity. But in a political world, individual statements can be taken out of context to weaken political adversaries, and so presidential advisers (many of whom have political ambitions, either regarding higher-level presidential appointments or regarding elected office) would be motivated through self-interest to censor their statements or reframe them in such a way that they could not be turned against the speaker. If the adviser anticipated that his statements may be publicly divulged, and the adviser could not formulate a politically-correct manner in which to phrase the advice, he might forego giving it altogether.

It also goes without saying that there is a correlation between the seriousness of the situation being discussed and the downside of certain policy choices; to govern at the national level involves making difficult choices. It follows that in discussing such challenging situations absolute candor is needed most. But it is also true, should things go awry, that the more serious a situation in which presidential decisions are being made, the more likely it is that Congress will investigate the matter.¹¹³ This results in a syllogism: the situations that most require frank, candid, and perhaps unpopular advice are those in which presidential advisers would be most concerned about having to repeat that advice before a watching world during a subsequent congressional committee hearing conducted by the opposition political

¹¹¹ See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Although Justice Jackson's statement referenced only the Bill of Rights, the context carries over here regarding constitutional principles found in the body of the original Constitution.

¹¹² *United States v. Nixon*, 418 U.S. 683, 708 (1974).

¹¹³ Two examples of this would be the U.S. government response after the 9/11 attacks and the events preceding the Iraq War. Both resulted in congressionally-created commissions and numerous congressional committee hearings. Cf. NAT'L COMM'N ON TERRORIST ATTACKS, *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* (authorized ed. 2004), available at <http://www.9-11commission.gov/report/>.

party in front of television cameras. The self-censorship arising from this possibility would then bar the President from receiving the best possible advice. Given the gravity of the consequences for the country when such advice is most needed, the results of this self-censorship could be disastrous to the national interest. Executive privilege is the only protection against this chilling effect and the consequences it would precipitate.

Perhaps underestimating these considerations, some advocate that Congress should always prevail in its attempts to obtain information from the President. One professor makes the odd contention that, “when an executive branch official raises executive privilege as a defense justifying her defiance of a congressional subpoena, the house of Congress is the proper tribunal to determine whether the invocation of executive privilege was appropriate.”¹¹⁴ That contention seems absurd on its face, despite its evident support from no one less than Justice Joseph Story,¹¹⁵ as it is not a balancing of interbranch interests at all. What Congress would ever vote that its demand for information can be rebuffed? It simply means that the resolution of every contest between the legislature and the executive should expeditiously end in the President buckling to Congress. That is hardly the dynamic one would expect from negotiations between truly coequal branches of government.

The fatal flaw in that argument arises from a faulty model. The Article at issue is based on the British governmental system, analogizing Congress to Parliament.¹¹⁶ The self-evident problem with that system, however, is that the British government is one of parliamentary supremacy.¹¹⁷ It misreads history to construe the original constitutional design as empowering Congress to overcome presidential secrecy by analogizing to Parliament and the Crown. Because Parliament was supreme in the British system of government, executive power was not completely inherent in the monarch. Rather, executive authority was largely derived from Parliament itself, as parliamentary supremacy makes executive power traceable to parliamentary authority. Thus there is no true separation of powers in the parliamentary system, without which no effective analogy can be made to the American concept of executive privilege. Indeed, the British Constitution is inferred largely from Acts of Parliament. This system of government stands in sharp contrast with the American system, under which the branches of government are established as coequals by a written Constitution.¹¹⁸

¹¹⁴ Chafetz, *supra* note 57, at 1085-86.

¹¹⁵ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 837 (1833).

¹¹⁶ Chafetz, *supra* note 57, at 1093-97, 1100-16.

¹¹⁷ *Employers' Liability Cases*, 207 U.S. 463, 536 (1907); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 572 (1832). Examples of Parliament manifesting its supremacy are manifold, and Chafetz's citing to such examples demonstrates the intrinsic flaw in his argument. *See, e.g.*, Chafetz, *supra* note 57, at 1118 & nn.247, 248 & 254 (citing GEORGE MACAULAY TREVELYAN, *THE ENGLISH REVOLUTION 1688-1689*, at 96 (Oxford Univ. Press 1965) (1938); Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 188 n.49 (2008)).

¹¹⁸ *See Loving v. United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring in judgment) (noting that there is not “a single separation-of-powers case in which [the Court] ha[s] relied on the structure of the English Government in attempting to understand the governmental structure erected by the Framers of the Constitution”); *cf. id.* at 776 (Scalia, J.,

The Constitution requires a degree of statesmanship among all of the federal branches to make government work.

The framers, rather than attempting to define and allocate all governmental power in minute detail, relied . . . on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.¹¹⁹

When such statesmanship is employed by both political branches, they should often be able to reach a mutually-acceptable arrangement, which is befitting elected leaders in a democratic republic. “Through the normal political process of confrontation, compromise, and accommodation, the coordinate branches can usually satisfactorily resolve their differences over executive privilege. We cannot solve our modern dilemma by resorting to the solution that was rejected by the Framers—that is, by demanding constitutional certitude.”¹²⁰

Occasionally, however, the coequal branches of government reach an impasse. When the legislative branch desires information that the executive branch does not wish to disclose, either they can reach a negotiated accommodation or they cannot. If they can reach an agreement, then the courts should abstain from involvement regardless of the terms of the political agreement. When agreement cannot be reached, Congress employs compulsory process with which the President refuses to comply, and no settlement can be reached, the courts then must arbitrate the impasse if properly presented in an Article III case. At that point there must be rules to determine the outcome. Executive privilege is such a rule.

B. The Rationale and Legal Theory for Executive Privilege

Executive privilege was developed to draw the appropriate lines between Congress’s undisputed need to obtain information necessary for legislative activity with the President’s need for candid advice and safeguarding material of a nature that ought not to be public. Executive privilege is vested in the President by the Constitution.¹²¹ The D.C. Circuit has noted that “[t]here is constitutional power, under the Necessary and Proper Clause, in the federal government to keep national security information secret.”¹²² That power extends to other information that must be kept confidential.¹²³

concurring in part) (“In drafting the Constitution, the Framers were not seeking to replicate in America the government of England; indeed, they set their plan of government out in writing in part to make clear the ways in which it was different from the one it replaced.”).

¹¹⁹ *AT&T II*, 567 F.2d 121, 127 (D.C. Cir. 1977).

¹²⁰ ROZELL, *supra* note 44, at 167.

¹²¹ *United States v. Nixon*, 418 U.S. 683, 711 (1974).

¹²² *AT&T I*, 551 F.2d 384, 393 (D.C. Cir. 1976) (footnote omitted).

¹²³ It should be noted, however, that the clause referenced by the D.C. Circuit would be a very odd locus for executive privilege. This statement is therefore cited for the underlying principle of the need for confidentiality, not suggesting that executive privilege would be derived from that clause. The Necessary and Proper Clause is part of the enumerated powers of Congress in Section 8 of Article I. See U.S. CONST. art. I, § 8, cl. 18. Yet executive

The President occupies a unique position in the constitutional design. While the legislative branch has 535 members¹²⁴ and depending how the issue is framed the judiciary has either nine (the members of the Supreme Court),¹²⁵ or almost one thousand,¹²⁶ the executive is only one person. But the President is distinguished by more than the singularity of his office. He is the chief of state, a national symbol, and is the face and voice of the nation. Americans do not have a monarch as chief of state and then a prime minister who is the chief executive, such as in the United Kingdom.¹²⁷ Nor do Americans have both a President and a prime minister, with the executive authority governing different policy areas divided between them, as in France.¹²⁸ Instead, all of these roles are combined in one person in the U.S. President.¹²⁹ Aside from the vast powers wielded by the President under Article II, he has unique resources, a ready press corps to carry his message (whether the press cares for the President or not), and the unique ability to shape the national discussion. The Supreme Court acknowledges that “the singularly unique role under Art. II of a President’s communications and activities, related to the performance of duties under that Article,”¹³⁰ require a correspondingly-circumspect legal status.

The concept of executive privilege begins with the proposition that a sitting President is absolutely immune from testifying to Congress regarding his official actions,¹³¹ as this would be tantamount to the executive branch answering to the legislative branch as one would to a superior. While that assertion has never been

privilege is a power that the President asserts *against* the power of Congress in an attempt to designate something beyond the power of Congress to discover. While it is intuitive that Congress’s investigatory power should have its situs in the Necessary and Proper Clause, no persuasive structural or case-law argument can be made that the enumerated powers of Congress implicitly guarantee converse concomitant rights to the other branches of government. This statement by the D.C. Circuit is likely correct that the Necessary and Proper Clause is the optimal locus for the governmental power to withhold certain information, but that would apply in the context of designating certain information classified to render it nonsusceptible to demands for public disclosure by enacting governmental-secrets legislation, rather than to permit the executive branch to withhold information from the legislative branch. Executive privilege, by contrast and like any other power wielded by President, must be situated in Article II.

¹²⁴ See U.S. CONST. art. I, § 3, cl. 1; 2 U.S.C. § 2(a) (2006).

¹²⁵ It is possible to define the judicial branch as only being nine members in that only the Supreme Court must exist. The Court’s existence is mandated by the first provision in Article III. See U.S. CONST. art. III, § 1, cl. 1. But that same clause says that Congress *may* create federal courts inferior to the Supreme Court.

¹²⁶ See 28 U.S.C. §§ 1, 44, 133 (2006) (establishing nine seats on the Supreme Court, 179 circuit judges, and almost 800 district judges, respectively).

¹²⁷ See generally 2 CLAYTON ROBERTS, DAVID ROBERTS & DOUGLAS R. BISSON, A HISTORY OF ENGLAND: 1688 TO THE PRESENT (4th ed. 2002).

¹²⁸ See generally MARTIN HARRISON, DE GAULLE TO MITTERRAND: PRESIDENTIAL POWER IN FRANCE (Jack Hayward ed., 1993).

¹²⁹ See generally GEOFFREY M. HORN, THE PRESIDENCY (2008).

¹³⁰ United States v. Nixon, 418 U.S. 683, 715 (1974).

¹³¹ See Clinton v. Jones, 520 U.S. 681, 692 & n.14, 694 n.19 (1997).

put to the test, it finds support in the writings of the Framers.¹³² Assuming *arguendo* that statement is true, to the extent that high-ranking White House officials would be advising the President, they effectively become alter egos of the President, just as advisers to members of Congress become alter egos of the member,¹³³ and therefore, making presidential advisers answerable to Congress would carry the same separation-of-powers concerns between the coequal political branches.

The President extends aspects of his office to those serving under him, in limited and diminished ways. Executive officers answering to the President are participants in the President's executive power on the President's behalf. This is true in a special way for members of the White House staff, who do not occupy offices created by Congress in agencies created by Congress. Members of the White House staff serve directly under the President as part of the White House Office.¹³⁴ Among these officials, the senior aides that consult directly with the President are essentially alter egos of the President, acting as direct extensions of his office and integral to the President's deliberations and actions.

The privilege held by such advisers is a derivative of the protection enjoyed by the President himself. Therefore, to understand the nature and scope of the immunity possessed by senior presidential advisers as a result of executive privilege, it is necessary to understand how that immunity applies to the President.

The President holds special legal protection, especially during his term of office. Although it has never been put to the test in court, most scholars believe that a sitting President cannot be criminally prosecuted while in office.¹³⁵ There is a strong historical and legal foundation for this proposition. The Great Chief Justice once stated that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual."¹³⁶ While the President is not "above the law,"¹³⁷ it is nonetheless the case that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated."¹³⁸ This protection exists for the good of the nation, not the benefit of the person occupying the presidency.

Although most of this Article focuses on executive privilege regarding top White House advisers, it should be noted that the relationship between the President and the Attorney General is unique. Although the Office of the Attorney General and the Department of Justice are creations of Congress,¹³⁹ the Attorney General is a lawyer

¹³² *E.g.*, THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

¹³³ *Gravel v. United States*, 408 U.S. 606, 615-17 (1972) ("[T]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . .").

¹³⁴ *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-606 GOV, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW 1-8, 24 (2008).

¹³⁵ 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 754-55 (3d ed. 2000).

¹³⁶ *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J., Circuit Justice).

¹³⁷ *United States v. Nixon*, 418 U.S. 683, 715 (1974).

¹³⁸ *Cheney v. U.S. District Court*, 542 U.S. 367, 385 (2004).

¹³⁹ *See* 28 U.S.C. §§ 501, 503 (2006).

whose duties include advising the President on legal matters.¹⁴⁰ This has the color of an attorney-client relationship, and as such has shades of attorney-client privilege. It is a long-held position that conversations between the President and the Attorney General are privileged.¹⁴¹

IV. CURRENT EXECUTIVE PRIVILEGE DOCTRINE

The current state of executive privilege doctrine is a checkerboard of disjointed case law. As a constitutional doctrine, it is governed by case law rather than statute.¹⁴² The Supreme Court has held that it is within the purview of the judiciary to delineate executive privilege.¹⁴³ The current rule is the balancing test of *United States v. Nixon* and its progeny,¹⁴⁴ a case with facts that were unusual enough to leave many aspects of executive privilege yet to be decided as questions of first impression.

There are different forms of executive privilege. The first is the presidential communications privilege, which concerns direct communication with the President and is rooted in the separation of powers.¹⁴⁵ The other is the deliberative process privilege announced in *In re Sealed Case*, which concerns executive communications to which the President is not a party but still involves governmental deliberations and finds its origin in the common law rather than the separation of powers.¹⁴⁶ This deliberative process privilege, therefore, extends to senior presidential advisers even when the President is not personally involved.¹⁴⁷ The former is stronger and owed greater deference and protection by the judiciary, which is intuitively correct since executive privilege, like all executive power under the Constitution,¹⁴⁸ finds its locus in the President and radiates from him to subordinate functionaries. And the presidential privilege endures in the face of alleged misconduct, while the deliberative privilege does not.¹⁴⁹

¹⁴⁰ *Id.* § 511.

¹⁴¹ *E.g.*, Confidentiality of the Att'y Gen.'s Commc'ns in Counseling the President, 6 Op. O.L.C. 481 (1982).

¹⁴² Some consider it possible for Congress to calibrate the scope of executive privilege. *E.g.*, William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 118-19 (1974). But assuming *arguendo* that such strictures would be constitutional, they would still have to be passed by Congress in accordance with the Bicameralism and Presentment Clauses, not implied by a single-chamber resolution from the congressional chamber seeking enforcement of a committee subpoena. Given the importance of executive privilege, it is difficult to imagine circumstances where any President would sign such a bill into law.

¹⁴³ *See United States v. Nixon*, 418 U.S. 683, 704 (1974).

¹⁴⁴ *Id.*

¹⁴⁵ *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

¹⁴⁶ *Id.* (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 753 & n.35 (1982)).

¹⁴⁷ *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993); *see also In re Sealed Case*, 121 F.3d at 749-50.

¹⁴⁸ *In re Sealed Case*, 121 F.3d at 745-46.

¹⁴⁹ *Id.* at 746.

In announcing the deliberative privilege in *In re Sealed Case*, the D.C. Circuit broadened executive privilege to a scope beyond the Supreme Court's holding in *Nixon*.¹⁵⁰ The case concerned documents sought in an Independent Counsel investigation of Agriculture Secretary Mike Espy, where the White House asserted privilege.¹⁵¹ The D.C. Circuit ruled in favor of the White House on 84 demanded documents.¹⁵² This became the first case in which a court denied Congress disclosure by applying executive privilege to cover information with which the President was not personally involved or aware.

A. Contextual Observations

Although not explored in this Article, there are two issues that should be noted before examining current executive privilege doctrine and how it could be improved.

First, the composition of executive-privilege case law is unusual. There are few Supreme Court cases; most cases are from the federal circuit or district court situated in the District of Columbia. This composition is partly due to the political calendar, as the relatively-short windows between presidential and congressional elections often result in executive privilege cases becoming moot or otherwise nonjusticiable. Another reason is geographical. With few exceptions,¹⁵³ most executive privilege cases are filed in Washington, D.C. Therefore, D.C. Circuit and D.C. District precedents supply most of the controlling authority on executive privilege cases. This resulting case law should be noted because several executive privilege rules would be questions of first impression if the cases noted here go up on appeal, and thus, the governing law could change substantially with relatively little adjudication.

Second, this Article does not explore various threshold issues that must be addressed before reaching the merits of these cases. The D.C. Circuit held that cases with fact patterns such as the ones discussed herein are justiciable.¹⁵⁴ Conflicts between the legislative and executive branches over congressional subpoenas can be litigated,¹⁵⁵ including executive privilege assertions.¹⁵⁶ But as a jurisdictional threshold to such adjudication,¹⁵⁷ the plaintiffs must establish standing,¹⁵⁸ requiring

¹⁵⁰ Nelson Lund & Douglas R. Cox, *Executive Power and Governmental Attorney-Client Privilege: The Clinton Legacy*, 17 J.L. & POL. 631, 651-52 (2001) (discussing *In re Sealed Case*, 121 F.3d 729).

¹⁵¹ *In re Sealed Case*, 121 F.3d at 734.

¹⁵² *Id.*

¹⁵³ *E.g.*, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) (concerning information sought by a grand jury in connection with the Independent Counsel investigation into President Clinton).

¹⁵⁴ *AT&T I*, 551 F.2d 384, 390 (D.C. Cir. 1976) (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)).

¹⁵⁵ *AT&T II*, 567 F.2d 121, 126 (D.C. Cir. 1977).

¹⁵⁶ *E.g.*, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

¹⁵⁷ *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)).

¹⁵⁸ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

“an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.”¹⁵⁹ The Supreme Court has cautioned that where separation of powers is involved, as with executive privilege, consideration of standing must be “especially rigorous,”¹⁶⁰ because “the case-or-controversy limitation is crucial to maintaining the ‘tripartite allocation of power’ set forth in the Constitution.”¹⁶¹ Although the D.C. Circuit had held that the House has standing to assert its investigatory power,¹⁶² subsequent Supreme Court opinions introduce doubt as to whether there might be substantial limitations to when Congress has standing to pursue executive privilege cases in court.¹⁶³ And there are other threshold issues as well, such as whether the House has a cause of action.¹⁶⁴ While these issues are beyond the scope of this Article, they should be noted and must be explored when adjudicating executive privilege cases, as they create significant obstacles to litigation.

B. *The United States v. Nixon Balancing Test and Modern Procedure*

Two 1974 cases create the framework for executive privilege claims. The D.C. Circuit considered an executive privilege claim against the U.S. Senate, and the Supreme Court faced a claim against a court subpoena in a criminal investigation. These cases were the first concerning executive privilege at the presidential level, and both adopted Chief Justice Marshall’s contention from an early trial court decision that the federal judiciary has the power to determine the propriety and enforceability of subpoenas against the President.¹⁶⁵

1. What Is Protected by the Current Rule

The D.C. Circuit case was *Senate Select Committee on Presidential Campaign Activities v. Nixon*,¹⁶⁶ the second round of litigation previously styled *Nixon v. Sirica*.¹⁶⁷ At issue was President Nixon’s refusal to turn over to the Senate Select Committee on Presidential Campaign Activities audio tapes of his conversations

¹⁵⁹ *Davis v. FEC*, 554 U.S. 724, 733 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

¹⁶⁰ *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

¹⁶¹ *Cuno*, 547 U.S. at 341 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982)).

¹⁶² *AT&T I*, 551 F.2d at 391.

¹⁶³ *Chenoweth v. Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999) (noting *Raines*, 521 U.S. at 829).

¹⁶⁴ Mem. of Points and Auths. in Supp. of Defs.’ Mot. to Dismiss & in Opp’n to Pl.’s Mot. for Partial Summ. J. on Counts I and II, *supra* note 20, at 38-39 (citing *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Alexander v. Sandoval*, 532 U.S. 275 (2001)).

¹⁶⁵ See *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692) (Marshall, C.J., Circuit Justice).

¹⁶⁶ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

¹⁶⁷ *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

with White House Counsel John Dean.¹⁶⁸ This was the first time Congress attempted to compel divulging such information.¹⁶⁹ The D.C. Circuit held that the President holds a presumptive privilege against congressional inquiries, rather than an absolute privilege,¹⁷⁰ a view later ratified by the Supreme Court.¹⁷¹

The Supreme Court took up the question of an executive privilege claim for the first time in *United States v. Nixon*.¹⁷² The trial court and President Nixon had reached an impasse when, following his being named an unindicted coconspirator,¹⁷³ the court subpoenaed audio tapes held by President Nixon and Nixon asserted executive privilege.¹⁷⁴ Rejecting Nixon's argument that the President holds an absolute privilege,¹⁷⁵ the Court stated that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from [investigative] process under all circumstances."¹⁷⁶ In its analysis, the Court announced a balancing test which still controls executive privilege cases. A court "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch,"¹⁷⁷ balancing the public interest served by protecting the President's confidentiality against the public interest served by disclosure.¹⁷⁸

Foreign matters are subject to a higher level of protection than domestic. Aside from national security or foreign policy, executive privilege can be defeated by "an adequate showing of need."¹⁷⁹ For congressional subpoenas, the question is "whether the subpoenaed materials are critical to the performance of its legislative function."¹⁸⁰ For example, in *AT&T I* the D.C. Circuit weighed Congress's need for the information sought against the risk to national security.¹⁸¹ The D.C. Circuit has noted that the executive branch is entitled to greater deference where foreign policy is concerned,¹⁸² and that the Supreme Court has said in dictum that its holdings thus

¹⁶⁸ *Senate Select Comm.*, 498 F.2d. at 726.

¹⁶⁹ *Id.* at 733.

¹⁷⁰ *Id.* at 729-31.

¹⁷¹ *United States v. Nixon*, 418 U.S. 683, 708 (1974).

¹⁷² *Id.* at 686-709.

¹⁷³ *Id.* at 686.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 703.

¹⁷⁶ *Id.* at 706.

¹⁷⁷ *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

¹⁷⁸ *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973).

¹⁷⁹ *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997).

¹⁸⁰ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

¹⁸¹ *AT&T I*, 551 F.2d 384, 391 (D.C. Cir. 1976).

¹⁸² *Id.* at 392 (citing *Chi. & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

far on executive privilege are not intended to control questions concerning military, diplomatic, or national security matters.¹⁸³

In *AT&T I*, a House subcommittee subpoenaed documents regarding warrantless wiretaps that AT&T had facilitated for the FBI.¹⁸⁴ Negotiations with the White House failed, at which point President Ford asserted that AT&T was acting as a government agent and accordingly instructed AT&T not to comply with the subpoena.¹⁸⁵ When AT&T refused to obey President Ford, believing it was legally bound to honor the subpoena,¹⁸⁶ the Justice Department sought to enjoin compliance,¹⁸⁷ resulting in a district court order favoring the White House.¹⁸⁸ The D.C. Circuit found that the case was properly understood as an interbranch dispute between Congress and the White House,¹⁸⁹ so the case turned on the reach of executive privilege. These wiretaps were for national security,¹⁹⁰ so the court's upholding of executive privilege, given the tenuous nature of the President's claim that AT&T was a government instrumentality, illustrates the extraordinary protection the privilege affords in national security contexts.

Military secrets are always protected by a close cousin of the national-security executive privilege, the state secrets privilege.¹⁹¹ One case, *United States v. Reynolds*, involved family of deceased Air Force personnel seeking information regarding their deaths in a military plane crash.¹⁹² The Supreme Court upheld the military's refusal to release the information, holding that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."¹⁹³

The D.C. Circuit has also held that the Supreme Court precedents governing executive privilege in criminal proceedings apply to civil proceedings as well,¹⁹⁴ though the Supreme Court has not had occasion to accept or reject that conclusion. There are two prongs to the executive privilege test in a criminal case: (1) the

¹⁸³ *Id.* at 391 (quoting *United States v. Nixon*, 418 U.S. 683, 706 (1974)). Although some were concerned that this language regarding almost insurmountable privilege for national security information would invite Presidents to abuse the special national security protections, e.g., Van Alstyne, *supra* note 142, at 117-18, subsequent years have not justified that concern.

¹⁸⁴ *AT&T I*, 551 F.2d at 385.

¹⁸⁵ *Id.* at 387.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 387-88.

¹⁸⁹ *Id.* at 389.

¹⁹⁰ *Id.* at 385.

¹⁹¹ See, e.g., *Tenet v. Doe*, 544 U.S. 1 (2005); *Ellsberg v. Mitchell*, 709 F.2d 51, 57-59 (D.C. Cir. 1983); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982); see also STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1037-55 (4th ed. 2007).

¹⁹² *United States v. Reynolds*, 345 U.S. 1, 2-3 (1953).

¹⁹³ *Id.* at 11.

¹⁹⁴ *In re Sealed Case*, 121 F.3d 729, 743-45 (D.C. Cir. 1997); *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1980).

subpoenaed materials must likely contain important evidence, and (2) that evidence cannot otherwise be discovered by due diligence.¹⁹⁵ Although executive privilege has been extended to civil matters, it is an open question whether this rule in criminal cases is also the rule in civil suits.

The D.C. Circuit has also outlined the procedure for executive privilege. The privilege may be invoked if information required from the executive involves presidential decision making or deliberation.¹⁹⁶ Only the President can assert the privilege.¹⁹⁷ The material is presumptively privileged, a presumption that can be overcome by an adequate showing of need,¹⁹⁸ after which the court conducts an *in camera* examination of the material, excising from the documents material it finds privileged.¹⁹⁹ For the material that passes initial review, the President must be given an opportunity before disclosure to present more particularized claims to justify withholding those items,²⁰⁰ and the court then releases the material if those supplemental claims are rejected.²⁰¹ While the *in camera* inspection is conducted to determine whether executive privilege applies,²⁰² the inspection itself only occurs after the party seeking disclosure makes a showing of need.²⁰³ Until such a showing has been made, the White House need not submit subpoenaed information even to the courts for inspection.²⁰⁴

The D.C. Circuit considers executive privilege analogous to attorney-client privilege, stating:

[No authority] explain[s] why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure . . . than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.²⁰⁵

The court here states there is no rationale why attorneys in government should enjoy a stronger privilege than presidential deliberations. But the converse is the important

¹⁹⁵ *In re Sealed Case*, 121 F.3d at 754.

¹⁹⁶ *Id.* at 744.

¹⁹⁷ *See, e.g.*, *TRIBE*, *supra* note 135, at 776 n.40.

¹⁹⁸ *In re Sealed Case*, 121 F.3d at 744-45.

¹⁹⁹ *Id.* at 745.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Nixon v. Sirica*, 487 F.2d 700, 704 (D.C. Cir. 1973).

²⁰³ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730 (D.C. Cir. 1974).

²⁰⁴ *Id.* at 730-31.

²⁰⁵ *In re Lindsey*, 148 F.3d 1100, 1114 (D.C. Cir. 1998).

point: the D.C. Circuit accords presidential communications the same confidentiality protection as applies in an attorney-client relationship. If cabinet secretaries, holding offices created by acts of Congress and only after being independently confirmed by the Senate, enjoy such protection, then it follows *a fortiori* that senior White House advisers, part of the Office of the President who never must be submitted to Congress for its approval, should enjoy that level of protection.

Subpoenas also cannot overcome executive privilege if the authority issuing them is engaged in “a general fishing expedition.”²⁰⁶ The Court suggests that congressional investigations cannot attempt to “expose for the sake of exposure.”²⁰⁷ This suggests a subpoena would be illegitimate if there was no bona fide legislative purpose (which is to say, likely just a political ploy). If so, that suggests courts can inquire into the purpose of a given subpoena, and possibly find it unenforceable.²⁰⁸ Congress also cannot defeat executive privilege if those pursuing the information “seek in any way to investigate the wisdom of the President’s discharge of his discretionary duties.”²⁰⁹ The Court invalidated a congressional investigation in 1881 as being “clearly judicial” because it lacked a legislative purpose,²¹⁰ establishing “that Congress must have a valid *legislative* purpose for conducting an investigation and for exercising the power of compulsory process.”²¹¹

The privilege is designed to err on the side of protecting executive confidentiality. The D.C. Circuit held Senate subpoenas investigating possible illegalities during the 1972 election insufficient to overcome executive privilege,²¹² even though investigating illegalities was the reason the committee was created.²¹³ Consistent with that approach, the Supreme Court has more recently determined that the White House does not need to “invoke[e] executive privilege with sufficient specificity and . . . particularized objections” as such detailed accounting would impose an administrative hardship.²¹⁴ The privilege therefore acts to prevent annoying or harassing procedures that could distract the President or impair executive officials fulfilling their duties.

Although this Article focuses on presidential privilege, it is also quite likely that some future controversies will center on deliberative process privilege if some of the

²⁰⁶ *Sirica*, 487 F.2d at 717.

²⁰⁷ *Watkins v. United States*, 354 U.S. 178, 200 (1957).

²⁰⁸ Case law is silent as to how deferential courts should be in making this inquiry. Must they presume good faith? How can that presumption be overcome? Is the standard of review a preponderance of the evidence, or must the evidence be clear and convincing? Is a court free to look askance at the subpoena and make Congress carry the burden? These are some of the many questions still open.

²⁰⁹ *Sirica*, 487 F.2d at 717.

²¹⁰ *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1881).

²¹¹ J. Richard Broughton, *Paying Ambition’s Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 WHITTIER L. REV. 797, 805 (2000).

²¹² *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

²¹³ See *id.* at 726 & n.2 (quoting S. Res. 60, 93d Cong. § 1(a) (1973)).

²¹⁴ *Cheney v. U.S. District Court*, 542 U.S. 367, 388 (2004).

sought-after information did not personally involve the President. This lesser deliberative privilege applies to

communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.²¹⁵

By cautioning that "presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President,"²¹⁶ the D.C. Circuit extended that privilege by negative inference to include anything that may ultimately require a presidential decision.²¹⁷ This could be broadly construed to cover a great deal of information, so likely additional judicial consideration will be necessary to trace the limits of that extension.

2. What Is (or May Be) Unprotected Under This Rule

Although there may be some aspects of criminal investigations where executive privilege could be used, it does not completely protect any individual. The Supreme Court found that "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III."²¹⁸ The Court held that allowing executive privilege to thwart "a subpoena essential to enforcement of criminal statutes . . . would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III,"²¹⁹ and it explained at length how allowing executive privilege to scuttle bona fide criminal investigations would undermine confidence in the criminal justice system.²²⁰

Executive privilege involving the President is limited to presidential communications relating to his responsibilities, affairs of office, public policy, and presidential decisions.²²¹ It does not apply to actions he committed before becoming President,²²² though district courts possess the power to delay pending litigation during the President's term.²²³ Similarly, although "Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and

²¹⁵ *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

²¹⁶ *Id.*

²¹⁷ *Cf.* Lund & Cox, *supra* note 150, at 655-56.

²¹⁸ *United States v. Nixon*, 418 U.S. 683, 707 (1974).

²¹⁹ *Id.*

²²⁰ *Id.* at 708-09.

²²¹ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (citations omitted).

²²² *Clinton v. Jones*, 520 U.S. 681, 694 (1997).

²²³ *Id.* at 706-08.

maintaining access to them for lawful governmental and historical purposes,”²²⁴ a court could delay their disclosure during the President’s tenure in office.

The D.C. Circuit has reasoned that although fact-finding of past events is part of the legislative process, such information is less important than in court proceedings because legislating focuses more on anticipating policy consequences than precisely reconstructing past events.²²⁵ While no executive privilege rule has been propounded from this reasoning, it suggests that there are situations where executive privilege would not prevail if a court finds that the sought-after information is essential in a courtroom setting because reconstructing facts would be essential to litigation, but falling short if intended for a congressional committee setting in which those facts would be nonessential.

C. Unanswered Questions Regarding Enumerated Powers such as Appointment Power

The case law therefore leaves a great many questions unanswered regarding executive privilege, again owing to the fact that executive privilege claims are rarely litigated. Such questions include:

[W]ho can assert executive privilege, the extent to which a sitting President can override the executive privilege claim of a former President, the length of the period of secrecy justified by a President’s need for candid advice, and whether a President can compel the silence of subordinates by invoking executive privilege.²²⁶

This underdevelopment of executive privilege doctrine makes the privilege problematic as a legal matter, with broad areas of uncertainty on this constitutional doctrine.

The Supreme Court provides a guidepost for such questions. The principle underlying executive privilege, which must guide its development and application, is “that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States.”²²⁷ Although it is common for Presidents of both parties to be targets of unfavorable editorials and even humor, the law must be mindful that “[t]he President’s unique status under the Constitution distinguishes him from other executive officials,”²²⁸ and thus, judicial actions directed at the President must treat him in a manner consistent with respect befitting the dignity of his office.

1. Exploring Unresolved Questions

One question often overlooked or disregarded *sub silentio* is how the contours of executive privilege should differ based on the setting in which it is asserted. Many

²²⁴ *Adm’r of Gen. Servs.*, 433 U.S. at 454.

²²⁵ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

²²⁶ *Lilley*, *supra* note 1, at 1135.

²²⁷ *United States v. Nixon*, 418 U.S. 683, 714-15 (1974).

²²⁸ *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

of the principal cases creating the case law governing executive privilege were courtroom cases,²²⁹ and casebooks often discuss executive privilege in a courtroom setting alongside other evidentiary privileges.²³⁰ In such cases there is Congress (or some other party) proffering its strongest argument in an adversarial fashion against the White House, which in turn rebuts with its strongest argument, with a federal judge sitting as a neutral arbiter to weigh the competing interests and rule on the assertion of privilege. By contrast, there is no neutral arbiter in a congressional hearing. The hearing is presided over by the chairman, who rules on questions or assertions of either the witnesses before him (here, perhaps a senior White House adviser) or of other members of the committee.²³¹ But the chairman is the only person with the authority to issue the subpoena seeking the testimony in the first place.²³² The chairman is not neutral; he is either a politician of the President's party, or he is a politician of the opposition party. Therefore, it is a foregone conclusion which way the chairman will rule on an assertion of any privilege to thwart his subpoena.

The Supreme Court's ruling that executive privilege cannot defeat a subpoena in criminal proceedings will not apply to many assertions of executive privilege both because there is usually no criminal statute involved (excepting of course the fact that contempt of Congress can have criminal penalties) and also because congressional oversight hearings are not adversarial proceedings before a neutral presiding officer, as is the case in a criminal prosecution. By the Court's own words, *United States v. Nixon* clearly does not cover situations such as these, because there the Court limited its opinion by saying that in that case it was not "concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the [President's] confidentiality interest and congressional demands for information."²³³ This creates additional uncertainty regarding civil suits, as the *Nixon* Court expressly limited its holding to criminal investigations.²³⁴ Though the logic of that case easily extends to many civil matters, the Court's own opinion limits its precedential effect to criminal suits, leaving its civil application an open question.

A final question is the difference of the privilege's scope in courtroom proceedings versus congressional proceedings. Aside from the distinctions already noted, the D.C. Circuit set forth a predicate for differentiating the two referenced above, saying that Congress's "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political

²²⁹ *E.g.*, *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997) (finding that "the presidential communications privilege could be overcome by the evidentiary demands of a civil trial").

²³⁰ *E.g.*, JON R. WALTZ & ROGER C. PARK, *EVIDENCE: CASES AND MATERIALS* 573, 656 (updated 10th ed. 2005).

²³¹ *See* CHARLES W. JOHNSON, *HOW OUR LAWS ARE MADE*, H.R. DOC. NO. 108-93, at 5, 11-14 (2003).

²³² *See* H.R. REP. NO. 110-423, at 33 (2007).

²³³ *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974).

²³⁴ *See id.*

acceptability, than on precise reconstruction of past events.”²³⁵ Where a court is able to separate cases when such reconstruction is required, it is possible to fashion different legal rules.

2. Presidential Appointment Power

In recent investigations, the Chairmen of the House Judiciary Committee and Senate Judiciary Committee specified that they desired copies of internal White House documents regarding replacing political-appointee prosecutors.²³⁶ That directly implicates presidential power under the Appointments Clause.

The Constitution gives general appointment power to the President. The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”²³⁷ Although Congress can grant appointment power to department heads or the courts,²³⁸ Congress can never wield such power itself.²³⁹ And although the Senate has a role in the appointment process of principal officers,²⁴⁰ the House has no role whatsoever.

This Appointments Clause issue has major implications both for one recent controversy and also for a controversy that may now be looming. As mentioned above, through the end of the Bush administration, the ongoing legal controversy involved U.S. attorneys. And with the change in control of the House that occurred in November 2010, it is quite possible that the federal courts will delve into the uncharted constitutional waters of congressional oversight of White House “czars.” All this comes in the context of a major Appointments Clause case in the Supreme Court, decided just last term.²⁴¹

Current federal law clearly states that U.S. attorneys are appointed by the President of the United States, subject to Senate confirmation.²⁴² Although this appointment is for a four-year term,²⁴³ that same statute clearly states that the President can remove them at any time, and does not require any cause to do so,²⁴⁴ echoing the Supreme Court’s determination that “[t]he power of removal is incident

²³⁵ Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974).

²³⁶ Letter from Rep. John Conyers & Sen. Patrick Leahy to Fred Fielding, Counsel to the President (Mar. 28, 2007) (on file with author).

²³⁷ U.S. CONST. art. II, § 2, cl. 2.

²³⁸ *Id.*

²³⁹ *Buckley v. Valeo*, 424 U.S. 1, 138-40 (1976). This is a separation-of-powers issue, explored in more detail below. The only body that can create an office—Congress—is the only one that never can fill that same office.

²⁴⁰ *See* U.S. CONST. art. II, § 2, cl. 2.

²⁴¹ *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151-61 (2010).

²⁴² 28 U.S.C. § 541(a) (2006).

²⁴³ *Id.* § 541(b).

²⁴⁴ *Id.* § 541(c).

to the power of appointment.”²⁴⁵ Although some could argue that Congress has a constitutional role to play in overseeing performance, the Court has held that Congress cannot direct the course of law enforcement by controlling who will enforce the law.²⁴⁶ That being so, it is difficult to understand what legislative role Congress is fulfilling by investigating the conversations surrounding the President replacing one politically-appointed law enforcement officer with another. When various agencies engage in policymaking under authority delegated by Congress there is perhaps an argument to be made that Congress can oversee the agency’s use of this delegated authority that carries a legislative character by its enacting of policy. But that should not apply where, as here, the questions concern federal prosecutors, because law enforcement is a purely executive function. Even if it intends to add some form of “for cause” clause to the appointing statute for U.S. attorneys, it still would not be necessary to know whether any such cause existed for those prosecutors replaced under the law as it is currently written.

The Court struck down part of the Federal Election Campaign Act of 1971 because some members of the governing body were appointed by Congress.²⁴⁷ In doing so it made clear that the Constitution is inflexible in prohibiting those who make the laws from enforcing or administering those laws.²⁴⁸ “The core concern of [the Appointments Clause] . . . is to ensure that federal executive power remains structurally independent of Congress and of the congressional power base.”²⁴⁹

The necessity of the President being able to remove political appointees who serve at his pleasure at any time and for any reason seems self-evident in reading Article II. The President alone is responsible to seeing that laws are faithfully executed.²⁵⁰

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.²⁵¹

The President is the commander-in-chief of American military forces and chief executive of the nation’s administration, and therefore, he is vested with the executive authority of the government to carry out those tasks. The President’s

²⁴⁵ *Myers v. United States*, 272 U.S. 52, 122 (1926). *But see Morrison v. Olson*, 487 U.S. 654 (1988) (possibly abrogating *Myers*).

²⁴⁶ *Springer v. Gov’t of the Philippine Islands*, 277 U.S. 189, 202 (1928).

²⁴⁷ *See Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

²⁴⁸ *Id.* at 139.

²⁴⁹ *TRIBE*, *supra* note 135, at 679.

²⁵⁰ U.S. CONST. art. II, § 3.

²⁵¹ *Buckley*, 424 U.S. at 135-36 (omission in original) (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)).

power to remove appointees was recognized and exercised as such throughout the entirety of the American presidency.²⁵²

This history also holds specific guidance regarding the current controversies. There is actually one historical precedent on point to this Article. Only once before has Congress demanded executive records regarding the removal of U.S. attorneys. The Senate requested Justice Department records to that effect from President Grover Cleveland, who categorically refused²⁵³ because appointing U.S. attorneys “is vested in the President alone by the Constitution.”²⁵⁴ It should be noted that the request there was for documents held by the Justice Department, which is a statutory creation of Congress,²⁵⁵ under an Attorney General who is confirmed by the Senate.²⁵⁶ In *Miers*, the request was for direct presidential communications held by the White House itself, concerning the private deliberations of the President. Although the courts never had occasion to consider the Cleveland incident, the Senate’s decision not to pursue the matter further is instructive. If it was acceptable to refuse such a congressional inquiry when it involved the Justice Department, then *a fortiori* it should be all the more acceptable when the question concerns only the White House.

Regarding U.S. attorneys, the Supreme Court stated in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.²⁵⁷

One of the fired U.S. attorneys made this point in writing against the administration.²⁵⁸ But this statement proves far too much if it is used to imply that there can be no political factors in appointing U.S. attorneys. The usual practice is that U.S. attorneys are recommended by home-state U.S. senators (holders of

²⁵² See generally Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667 (2003).

²⁵³ 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4961 (1897).

²⁵⁴ *Id.* at 4964.

²⁵⁵ 28 U.S.C. § 501 (2006).

²⁵⁶ *Id.* § 503.

²⁵⁷ *Berger v. United States*, 295 U.S. 78, 88 (1935).

²⁵⁸ John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 279 & n.38 (2008).

political office),²⁵⁹ with the decision then made by the President and reviewed by the Senate (also holders of political office). Taking the above statement to support that implication would result in U.S. attorneys needing to be civil service employees, career government workers chosen through a merit-based hiring mechanism.²⁶⁰ The idea that it is even possible for a person whose hiring comes from a U.S. Senator recommending someone to the U.S. President and then facing a vote from the U.S. Senate to obtain the position in question without any political considerations is simply preposterous, and would therefore be a plain misreading of *Berger*.

Appointments are among a President's most consequential acts. The courts have expressly been mindful of the unitary nature of the executive in matters of executive privilege, with the D.C. Circuit admonishing that "[t]he Constitution after all vests the executive power not in the executive branch, but in the President,"²⁶¹ and the Supreme Court likewise cautioning that the President is "the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity."²⁶² Some could argue that the Court has perhaps at times undervalued that distinction recently,²⁶³ and so it behooves the judiciary to appreciate that distinction in defining executive privilege.

However, White House "czars" are an entirely different matter as far as the Constitution is concerned. "In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'"²⁶⁴ That mechanism requires Congress to create the various executive offices in which these subordinate officers assist the President. As explained in more detail below, one element of the separation of powers is that only Congress can create such offices. While the President is welcome to have whomsoever he wishes as a White House adviser, to suggest or examine specific subjects or topics at the President's request, such a person has no executive authority to make any government action unless that person is an officer of the United States. Although principal officers must be confirmed by the U.S. Senate before exercising any authority, even inferior officers can only hold offices that Congress deigns to create.

²⁵⁹ Laura Mansnerus, *New Jersey G.O.P. and Legal Elite Differ on U.S. Attorney*, N.Y. TIMES, Aug. 26, 2001, <http://query.nytimes.com/gst/fullpage.html?res=9B07E5D71131F935A1575BC0A9679C8B63&partner=rssnyt&em=rss>.

²⁶⁰ Cf. Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. § 2101 (2006)).

²⁶¹ *In re Sealed Case*, 121 F.3d 729, 748 (D.C. Cir. 1997).

²⁶² *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

²⁶³ *E.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (overriding the President's policy judgments on procedural protections for enemy combatants captured and held abroad by the U.S. military during ongoing hostilities).

²⁶⁴ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (alteration in original) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939)).

D. The Courts Should Adopt a Multi-Factor Test for Interbranch Executive Privilege Cases

The executive privilege balancing test lends itself to a multi-factor analysis, rather than individual and discrete per se rules derived from specific cases. The key to executive privilege claims between the President and Congress is finding the common border of their constitutional roles. This analysis applies the information already considered in this Article to construct a judicially-manageable framework for executive privilege.

The President has a constitutional duty to perform, consisting of executing and administering the laws, formulating foreign and national-security policy, commanding the U.S. military, and nominating individuals to various executive and judicial offices. The President must constantly determine which individuals best suit his needs in fulfilling his duties, and therefore, he is constantly appointing and removing subordinates from various offices created by Congress. That role is independent of Congress, and in it, the President requires information and expert advice, some of which must be kept confidential for the President to perform his duty well. Other information, such as that pertaining to military secrets, intelligence, or sensitive diplomacy, requires even more confidentiality.

Congress also has a constitutional duty to perform, legislating. This duty includes annual legislation for appropriations and authorizations, which entails appropriating and authorizing executive departments created by Congress. Further, these departments are led by officers confirmed by Congress, holding offices created by Congress, and enacting policy under authority delegated by Congress. Therefore, Congress requires information regarding the performance of those individuals and agencies, both to inform its annual monetary and authorizing renewals of those entities, and also to keep a watchful eye as to whether new legislation is necessary, prudent, or beneficial.

Thus, both of these constitutional branches have a need for information, and those informational needs are sometimes in tension or even conflict. There are discernable lines between what is properly within congressional purview versus what properly belongs within presidential purview.²⁶⁵ But that line is not uniformly situated in all executive privilege assertions during interbranch disputes over

²⁶⁵ Such lines should be drawn according to legal formalism, rather than utilitarianism. It proceeds from the wrong premise to say “[o]utcomes to executive privilege disputes between the political branches that preserve the governmental structure established by the Constitution [are] obviously . . . constitutionally preferable to those that do not.” Lilley, *supra* note 1, at 1144. Such statements are apparently premised on admonitions from the Supreme Court such as, “[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). But this utilitarian approach by academic commentators misreads the Supreme Court’s admonishment and must be categorically rejected. Any judicial outcome that does not preserve the constitutional structure is ipso facto unconstitutional and wholly invalid. Promulgating clear constitutional rules for executive privilege sometimes exacerbates interbranch political conflicts. Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 220-21 (1992). Although it is true that when the political branches resort to hardball tactics during times of partisan impasse, the outcomes are rarely optimal, see Lilley, *supra* note 1, at 1145-48, that is not the proper concern of the judiciary.

information. There are several factors that shift the line toward executive confidentiality or toward legislative oversight, depending on the actors involved and the government action at issue.

This suggests that the courts should employ a multi-factor analysis in executive privilege cases.²⁶⁶ There are at least seven discernable factors (not including subfactors) that counsel either for or against executive privilege in a given situation, and courts may discover others as they apply this framework. Employing this framework would facilitate a consistent and logical resolution of executive privilege cases. This, in turn, would inform both political branches of what is and is not protected over time as a court applies the framework to different cases, which should increasingly help obviate future litigation between the elected branches.

1. Office Created by Congress

The first factor is whether the information sought is held by an agency created by Congress. As previously mentioned, Congress has an oversight role largely as an incident to its appropriating function. To the extent that Congress has an oversight role beyond appropriating,²⁶⁷ it can assert a responsibility to monitor the effectiveness of legislation it has passed. A logical extension of that reasoning is that if an agency is a creation of Congress, then Congress can claim a duty to gather such information as is necessary to determine whether that agency is functioning properly. For example, the Department of Agriculture is a creation of Congress, and so Congress could cite a responsibility to assess whether the department is properly fulfilling Congress's intended purpose for the department. To the extent that this factor is present, it weighs in favor of disclosing information to Congress.

2. Policymaking

The second factor is whether the information pertains to policymaking. Legislation is the codification of public policy. It is appropriate to say that policymaking is often—if not always—legislative in nature, whether it is being performed by the legislature or some other branch. Administrative actions such as rulemaking and promulgating regulations are often policymaking actions. To the extent that executive actors are policymaking, they are engaged in an action that is arguably legislative. To the extent that the action is legislative, it is partaking in the legislative function.²⁶⁸ Congress, as the legislative branch, can rightfully assert that

²⁶⁶ It should be noted that some object to the concept of courts resolving these disputes. *E.g.*, Chafetz, *supra* note 57, at 1153 (“The Constitution does not set the judiciary up as a parent figure, ready to solve disputes between fractious political siblings.”). But the Constitution does empower the judiciary to say “what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—that is, to draw the constitutional lines in such a way as to resolve intrinsic tensions.

²⁶⁷ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (stating that Congress has “the power of inquiry . . . [as] an essential and appropriate auxiliary to the legislative function”).

²⁶⁸ However, the executive branch of government can never exercise legislative power per se. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“Although this Court since 1928 has treated the ‘intelligible principle’ requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of ‘intelligible principles.’ Rather, it speaks in much simpler terms: ‘All legislative Powers herein granted shall be vested in a Congress.’” (citations

policymaking actions fall under its jurisdiction, because such actions are performed under Congress's statutory delegation of authority.²⁶⁹ For example, the Environmental Protection Agency's (EPA) determinations regarding what level of arsenic is safe for drinking water would be a policy judgment that could be enacted with legislation, and Congress could inquire into the reasoning that went into formulating that standard.²⁷⁰ Therefore, Congress can claim a right to information regarding this policymaking, under the theory that because Congress delegated the power being exercised, the delegating authority has a right to monitor its use to determine whether that delegation should be rescinded or modified. This factor weighs in favor of disclosure to Congress.

As a subfactor of this second factor, if the information does concern policymaking, then the nature of the policy is important. The executive branch has primary, and thus, enhanced authority regarding foreign policy. Foreign policy can also be more sensitive in nature, requiring greater confidentiality, and more directly impact diplomatic, military, and national security concerns, which the Court has acknowledged to be the apex of presidential strength in executive privilege disputes.²⁷¹ Therefore, Defense Department rules and regulations that impact the capabilities of U.S. troops stationed overseas should be more protected than Agriculture Department rules and regulations for meat inspections.

3. Extra-White House Origins

The third factor is if the information is held by an agency that is part of the White House, whether it is a statutory creation that was ever independent of the White House. The Executive Office of the President does not just include the White House Office; it includes a variety of offices. Some of these were formerly independent agencies that were subsumed into the Executive Office of the President, bringing it under the aegis of the President.²⁷² For example, the Office of Management and

omitted)). *Contra* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1826 n.2 (2009) (Stevens, J., dissenting).

²⁶⁹ See, e.g., *Am. Trucking*, 531 U.S. at 472; *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

²⁷⁰ Congress investigated proposed changes in what level of arsenic in drinking water is safe, a decision that Congress allowed the EPA to make. A change was ordered in the final days of Bill Clinton's presidency and then was reversed by George W. Bush. See James M. Taylor, *Congress Preempts EPA in Mandating New Arsenic Standards*, ENV'T & CLIMATE NEWS, Oct. 1, 2001, http://www.heartland.org/full/844/Congress_preempts_EPA_in_mandating_new_arsenic_standards.html.

²⁷¹ See *United States v. Nixon*, 418 U.S. 683, 706 (1974).

²⁷² The constitutional status of these instances of the President deciding to subsume "independent" agencies into the White House is questionable to some degree. (The word "independent" is in quotes because, as Justice Scalia observed, Article II of the Constitution declares that all executive power is vested in the President, and thus, the concept of an executive agency independent of the President seems an oxymoron. See *Morrison v. Olson*, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting) (discussing U.S. CONST. art. II, § 1, cl. 1)). If an agency was created by Congress as an administrative entity, why redesignate it to a new status within the executive branch? What is the constitutional rationale for establishing varying grades of separation from the President, who is the chief executive of the federal government? This creation and promulgation of the Executive Office of the President,

Budget was formerly the Bureau of the Budget, a part of the Treasury Department created in 1921.²⁷³ President Franklin Roosevelt brought it under his more direct control by making it an office within the White House in 1939.²⁷⁴ It, therefore, still carries an element of statutory creation even though it is now to some degree part of the White House. Such a factor counsels against executive privilege and in favor of disclosure.

4. Textual Commitment in the Constitution

The fourth factor is whether there is a textual commitment of the underlying subject or individual in the Constitution. Textual commitments are strong indicia of which branch of government should have primacy for any given government action or policy area. If the matter in question is referenced in Article II, such as military matters implicated by the Commander-in-Chief Clause,²⁷⁵ this counsels in favor of confidentiality. This is consonant with executive privilege being possibly undefeatable where national security is concerned, and also finds support in the fact that the related state-secrets privilege is insurmountable.²⁷⁶ If the subject at issue in a given case involves Article I matters, such as expenditures implicating the Appropriations Clause²⁷⁷ or regulation of interstate commerce,²⁷⁸ then it counsels in favor of disclosure to Congress.

The most significant of the textual commitments favoring Congress is if Congress is contemplating the impeachment or removal of the President. There is a certain presumption of good faith when the President is in his normal standing with the nation. Even a President wracked by scandal is still the President and cannot be made to endure undue interference, as the nation would suffer if the President were impaired from the performance of his duties. But the House retains the power of impeachment²⁷⁹ and the Senate the power of removal,²⁸⁰ and if those bodies formally

consisting of entities that are external to the White House, but somehow less distinct than they formerly were as independent agencies, creates a perplexing intermediate stage of quasi-independent entities. As Justice Robert Jackson observed, the proliferation of so-called independent agencies in the regulatory state is problematic in its own right when delineating constitutional lines of authority, arguably going beyond the tripartite form of government prescribed by the Constitution by almost creating a fourth branch of government. *See* *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). It only further complicates the constitutional justifications of such a system to take executive branch entities that were considered in some degree independent from the President, then to give them a new designation denoting closer proximity to the President than merely being agencies in the executive branch (i.e., Executive Office of the President) and yet somehow not part of the White House itself by remaining outside the White House Office.

²⁷³ *See* RELYEA, *supra* note 134, at 12.

²⁷⁴ *See id.* 7-8.

²⁷⁵ *See* U.S. CONST. art. II, § 2, cl. 1.

²⁷⁶ *See* *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

²⁷⁷ U.S. CONST. art. I, § 9, cl. 7.

²⁷⁸ *Id.* § 8, cl. 3.

²⁷⁹ *Id.* § 2, cl. 5.

²⁸⁰ *Id.* § 3, cl. 6.

embark upon that course, then the presumption of good faith and deference to the President is lessened. He is under a political indictment of constitutional proportions. Thus, if the House or Senate is engaged in impeachment or removal proceedings, then this setting would be a factor in Congress's favor in overcoming executive privilege.²⁸¹

5. Presidential Involvement

The fifth factor is whether the President was personally involved. The executive power is vested in the President, and the interest in confidentiality has its locus in the President. The distinction between the presidential communications privilege and the deliberative process privilege, with the former being more powerful, supports making presidential involvement a factor. Presidential involvement counsels in favor of confidentiality, as it raises a constitutional concern. Without a constitutional concern, the courts have already held executive privilege sans presidential involvement to be merely common law in origin.²⁸² If the courts adopted this factor it would provide a more coherent rationale for the distinction of the two forms of executive privilege and help integrate executive privileges into a unified doctrine.

In the event of presidential involvement, the degree of that involvement becomes a subfactor. There is an interest in presidential confidentiality, and the risk of disclosure being revelatory of presidential deliberations is positively correlated to the level of presidential involvement in any given situation. The President seeing one memorandum on an issue does not entail the same degree of confidentiality interest as the President having a dozen meetings with his senior advisers to discuss that same issue. The more involved the President is, the stronger this factor counsels in favor of confidentiality.

6. Nature of Other Actors

The sixth factor is the nature of the actors aside from the President. Not all non-presidential actors are equal in terms of executive privilege. There are five subfactors under this heading that form a continuum, and as one progresses through that continuum the interest in presidential confidentiality decreases while the interest in congressional discovery increases.

The first subfactor, with the strongest interest in confidentiality, is the Vice President of the United States. The Supreme Court has held that the Vice President shares in executive privilege.²⁸³ The Vice President is an independent constitutional officer, specifically named in Article II. Although the textual grants of authority to the Vice President seem minor, the Vice President's status as a constitutional officer nonetheless renders him utterly independent of Congress.²⁸⁴ Also, the Vice President

²⁸¹ Lilley, *supra* note 1, at 1143.

²⁸² *In re Sealed Case*, 121 F.3d 729, 749-50 (D.C. Cir. 1997); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993).

²⁸³ *See Cheney v. U.S. District Court*, 542 U.S. 367, 385 (2004).

²⁸⁴ It is true that the Vice President is also an officer of Congress as the President of the Senate. U.S. CONST. art. I, § 3, cl. 4. However, that Office is entirely distinct from his executive office and does nothing to undermine the complete independence of the Vice President in his executive capacity from the legislative branch.

is by statute a member of the National Security Council,²⁸⁵ vesting him with a significant national security portfolio. Additionally, recent administrations give the appearance of the Vice President being heavily involved in senior-level presidential deliberations. And unlike the President's other advisers, which serve at the pleasure of the President and can therefore be replaced at will to shield the President, the Vice President holds his office for a period coterminous with the President, creating a unique concern for confidentiality.

The second subfactor is, within government personnel, whether the actor is a Senate-confirmed employee. There is actually an argument on both sides of this factor. The first is that Senate-confirmed employees are principal officers instead of inferior officers²⁸⁶ and as such are closer in proximity to the President. The closer the proximity to the President, the greater the interest is in confidentiality. The counterargument is that the Senate's confirmation of the individual gives Congress an enhanced interest in holding him accountable. This may be true, but if so that would apply only to Senate oversight. Restricting the scope of the argument for a moment to the House, Senate-confirmed employees should enjoy greater executive-privilege protection.²⁸⁷

The third subfactor is, within appointed personnel, commissioned officers versus non-officers. This has the same concern given under the second subfactor. On one hand government officers that are not Senate confirmed can be considered closer to the President and therefore be attended by a greater interest in privilege, while on the other hand those offices are created by Congress, and so Congress can assert an interest in accountability. On balance, however, this should be seen as an exercise of the President's express appointment power, which mentions inferior officers but does not mention governmental appointees of lower rank that are not officers. Therefore, this counsels in favor of confidentiality.

The fourth subfactor is, within governmental personnel, appointed individuals versus career individuals. Appointed individuals should have a greater interest in confidentiality because they are beneficiaries of the President's appointment power, showing a textual commitment to the President in the Constitution. Other government employees hold their jobs only under congressional authority and appropriations, which counsels in favor of congressional oversight. These employees enjoyment of civil service protection solely as a grant of congressional action augments Congress's interest in being able to subject these employees to oversight.

The fifth subfactor is government personnel versus the private sector. Employees of the executive branch are—at least from a constitutional perspective—ultimately carrying out the agenda of the chief executive. Employees of the private sector, although they can contract with a government entity to carry out programs and actions for the executive, are not by their nature subordinates to the President.

²⁸⁵ National Security Act of 1947, Pub. L. No. 80-235, 61 Stat. 496 (codified as amended at 50 U.S.C. §§ 401-32 (2006)).

²⁸⁶ *Morrison v. Olson*, 487 U.S. 654, 670-71 (1988).

²⁸⁷ While it seems counterintuitive that the two Houses of Congress would have different levels of investigatory power, the fact remains that, in addition to being a legislative body, the Senate has a quasi-executive role through its confirmation power.

Therefore, private sector involvement counsels strongly in favor of disclosure to Congress.

7. Czars

A new element in the governmental structure that could be listed as a subfactor of the previous heading, but has become a factor in its own right under this heading, is whether the officer is a “czar.” There is a distinction between White House staff versus personnel in an agency or department. The White House exists as a constitutional imperative, whereas no other executive-branch entity can make such a claim.²⁸⁸ Within this framework, there is a separation between the roles of White House personnel versus other executive officers. The former are advisory in nature, whereas the latter exercise operational management through administrative action and implementing the President’s directions.

To the extent that a czar is a White House adviser with no powers other than that of any other adviser, there is no difference in terms of executive privilege. Similarly, if a person is called a czar, but is in fact a Senate-confirmed principal officer, the moniker of “czar” is again of no moment. (For example, the director of the White House Office of National Drug Control Policy is called the “drug czar,” but in reality is a Senate-confirmed officer occupying an office created by an act of Congress.²⁸⁹) So that is to say, if someone is called a czar but in fact is otherwise indistinguishable from other political appointees in the executive branch, then there is no constitutional concern regarding that appointee’s status.

But a President cannot have his cake and eat it, too. No President can create a governmental office without congressional authorization if that office exercises executive authority. Even if such an office exists, no President can then appoint any person to hold such an office, unless Congress by statute authorizes him to do so.²⁹⁰ And if that person wields sufficient stature or power to be regarded as a principal officer, then Senate must first confirm that person.²⁹¹ So if a President names a czar who is anything other than a White House adviser—a person who exercises any government authority over any public or private person or entity—then such a person has no lawful protection for his actions, and as such, this factor strongly counsels in favor of disclosure.

This factor should weigh heavily in favor of disclosure because of the inherent illegitimacy of such czars whenever they engage in operational management. For example, take so-called “terrorism czar” John Brennan, who is President Obama’s

²⁸⁸ The Constitution expressly references Cabinet-level departments. *See* U.S. CONST. art. II, § 2, cl. 1. Also, the constitutional references to Congress raising an army and navy, *id.* art. I, § 8, cls. 12, 13, and the President serving as commander in chief of the army and navy, *id.* art. II, § 2, cl. 1, and the President both nominating ambassadors and receiving them, *id.* § 2, cl. 2; *id.* § 3, strongly suggest a Department of Defense (formerly the Department of War and Department of the Navy) and Department of State, specifically. Nonetheless, the Constitution does not explicitly mandate any particular executive-branch agency.

²⁸⁹ *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

²⁹⁰ *See* *Buckley v. Valeo*, 424 U.S. 1, 125-27 (1976).

²⁹¹ *Morrison*, 487 U.S. at 670-77.

Deputy National Security Advisor for Homeland Security and Counterterrorism.²⁹² A terrorist referred to in the media as the “underwear bomber” attempted to detonate an explosive device onboard a transatlantic flight shortly before the airliner landed in Detroit on Christmas Day 2009.²⁹³ Shortly after the incident the Director of the National Counterterrorism Center (NCTC) asked Mr. Brennan if the Director should prematurely end his skiing vacation with his son and return to Washington, D.C., to take up his post at the NCTC; Mr. Brennan told the Director that he could continue on his vacation.²⁹⁴

Rather than acting as an adviser to the President, here, Mr. Brennan was assuming operational control of a situation and issuing instructions to a Senate-confirmed official managing an executive agency. Yet, Mr. Brennan was never confirmed by the Senate, and for that matter his office was never created or sanctioned by Congress. He was acting completely outside the constitutional framework, wielding extraordinary power without any public accountability. Such accountability is the quintessential hallmark of the rationales underlying the Appointments Clause.²⁹⁵ To allow such exertions of power by someone who is neither elected through the democratic process (the President) nor subject to congressional oversight and confirmation (principal officers) circumvents critical constitutional safeguards that serve as a check on governmental power. Individuals acting as *de facto* principal officers in the name of the President should be completely unprotected by executive privilege and fully answerable to Congress.

Again, with the exception of “czars” acting as executive-branch officers asserting operational authority, none of these factors or subfactors is intrinsically dispositive. But, by adopting a framework with all of these factors, the courts can establish a general theory with which to evaluate all executive privilege claims, providing coherency and predictability to how a court will adjudicate executive privilege claims.

V. COURTS SHOULD REFUSE BOTH RECENTLY-OFFERED SOLUTIONS IN FAVOR OF AN ALTERNATIVE APPROACH

A case study can help demonstrate how this approach would work in litigation. In the recent *Miers* case, neither party’s arguments were persuasive; thus, courts should accordingly decline to adopt either position. The core thesis of both the White House position and Congress’s position was flawed. There may be no way to restore the status quo ante; this litigation confirmed the need for the judiciary to draw a clear line regarding executive privilege, which in the *Miers* case specifically concerned when the President is discussing an exercise of his explicit constitutional power with his immediate White House advisers. And while it is obvious that the

²⁹² EXEC. OFFICE OF THE PRESIDENT, ANNUAL REPORT TO CONGRESS ON WHITE HOUSE OFFICE STAFF 3 (July 1, 2009), *available at* <http://www.whitehouse.gov/assets/documents/July1Report-Draft12.pdf>.

²⁹³ See “*Meet the Press*” Transcript for February 7, 2010, MSNBC.COM, http://www.msnbc.msn.com/id/35270673/ns/meet_the_press/.

²⁹⁴ Jonathan Weisman & Siobhan Gorman, *Obama Orders Security Fix*, WALL ST. J., Jan. 8, 2010, <http://online.wsj.com/article/SB126287015166119561.html>.

²⁹⁵ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010).

executive branch would benefit from such a holding, the judicial branch and even the legislative branch would benefit as well.

A. Courts Should Reject Both Proposed Arguments

Both the White House (via the Justice Department) and the U.S. House (through the Judiciary Committee) presented arguments in the *Miers* case that are likely the same basic arguments that will be raised in future lawsuits involving executive privilege. For purposes of analysis, this Article ignores threshold issues such as standing and justiciability, focusing on the merits of executive-privilege assertions.

1. Congressional Arguments

Congress makes the obvious arguments. Regarding the Judiciary Committee, the House argues that a person must appear before a committee in order to assert privilege.²⁹⁶ It argues that there is no immunity for former presidential aides,²⁹⁷ because the President himself is not immune from testifying.²⁹⁸ Assuming *arguendo* there is immunity, it is still not absolute immunity. Congressional Democrats also alleged in *Miers* that replacing federal prosecutors potentially undermines criminal investigations.²⁹⁹ The Committee claimed that these hearings were investigative of whether corrective legislation was required.³⁰⁰

Several of these arguments are flawed or incorrect. Justice Jackson once said in *Youngstown Sheet & Tube Co. v. Sawyer*, the *Steel Seizure Case*, that, like those seeking to defeat executive privilege assert in recent litigation, “[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”³⁰¹ That case was inapposite in *Miers* (though it would seem relevant to a President asserting that a czar exercising executive power need not testify before Congress). In *Youngstown*, President Truman was making legislation by executive fiat in ordering the Secretary of Commerce to seize steel production facilities; he was merging both the legislative and executive powers. Making legislation requires the cooperation of both elected branches.³⁰² Here, the question concerns the prerogatives of the executive vis-à-vis Congress; rather than a cooperative issue and a question of enacting policy, it is an adversarial issue with no policy elements.

The Committee asserted that Mr. Bolten and Ms. Miers must comply with the subpoena, and argues that the idea of any executive official not being subject to such

²⁹⁶ Mem. of Points & Auths. in Supp. of Pl.’s Mot. for Partial Summ. J., *supra* note 20, at 26.

²⁹⁷ *Id.* at 30-32.

²⁹⁸ Mem. of Points & Auths. in Opp’n to Defs.’ Mot. to Dismiss & in Reply to Defs.’ Opp’n to Pl.’s Mot. for Partial Summ. J. at 100, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 1:08-cv-00409).

²⁹⁹ Mem. of Points & Auths. in Supp. of Pl.’s Mot. for Partial Summ. J., *supra* note 20, at 7.

³⁰⁰ *Id.*

³⁰¹ *Steel Seizure*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

³⁰² Except when Congress overrides the President’s veto via a two-thirds supermajority vote.

subpoenas is without precedent. Those who note that during the early years of republic congressional subpoenas were not second-guessed by the judiciary also acknowledge that this practice of acquiescing to legislative inquiries was inherited from the English system,³⁰³ a system wherein Parliament is supreme.³⁰⁴ Thus, the system we inherited was one in which the executive was always required to answer to the legislature.

2. White House Arguments

The true party-in-interest in executive-privilege cases is the President of the United States. The named parties in the *Miers* suit were Harriet Miers and Joshua Bolten. All litigation on their behalf was handled by the Department of Justice. Yet these suits concern the President's use of his constitutional authority, the executive privilege at issue is held by the President and asserted by the President, and each of the defendants and potential defendants are being targeted solely for their interaction and relationship with the President. Therefore, the true party here is the President.

The White House argued such cases are nonjusticiable. It argued that the courts lack jurisdiction because the House lacks standing to sue.³⁰⁵ It also argued, assuming *arguendo* that there is standing, the House lacks a cause of action.³⁰⁶ Another alternative argument was that, assuming there is a cause of action, the court should refuse to decide this matter and should decline to exercise jurisdiction on equitable grounds.³⁰⁷

Each of those issues is beyond the scope of this Article, except that issues of standing and causes of action were touched upon earlier to set the context for the reluctance to adjudicate that the judiciary should show on executive privilege clashes between coordinate branches. Regarding the political question doctrine, where courts decline to exercise jurisdiction because the conflict is of a nature that ought to be decided by the two political branches,³⁰⁸ the D.C. Circuit has held that "neither the political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement."³⁰⁹ Because executive privilege is derived from implied—not express—constitutional powers on both sides, there is no unequivocal constitutional title. This is consistent with Supreme Court guidance that "the presence of constitutional issues with significant political overtones does not automatically invoke the political

³⁰³ E.g., Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 866-69 (1975).

³⁰⁴ See generally JEFFREY GOLDSWORTHY, *SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999).

³⁰⁵ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 67-68 (D.D.C. 2008).

³⁰⁶ *Id.* at 78.

³⁰⁷ *Id.* at 94.

³⁰⁸ See *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (Frankfurter, J., plurality opinion); Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 270-73 (2008).

³⁰⁹ *AT&T II*, 567 F.2d 121, 127 (D.C. Cir. 1977).

question doctrine.”³¹⁰ Thus, the political question doctrine does not apply in the D.C. Circuit, though it would pose a question of first impression for the Supreme Court.

On the merits, the White House argued in *Miers* that senior aides should be absolutely immune from congressional subpoenas, such that the adviser need not appear before the Committee.³¹¹ This argument may have some force from a separation-of-powers perspective, but any White House “claim of absolute immunity from compelled congressional process . . . is without any support in the case law.”³¹² Instead, it is for the courts to determine the scope and application of executive privilege.³¹³ Consistent with longstanding precedent, current case law requires that executive privilege questions be resolved on the return of the subpoena and does not allow the executive branch to simply disregard subpoenas on a claim of immunity from testifying.³¹⁴ The *Miers* district court thus left question-specific assertions of executive privilege as the only acceptable application of the privilege in circumstances such as these. The court noted with seeming approval that other witnesses in the recent investigations employed this question-by-question assertion of executive privilege, citing the example of one Bush White House political director.³¹⁵

Yet the executive has often asserted this position of absolute immunity from judicial process. Administrations of both parties therefore maintain that senior White House officials—those that directly advise the President—should always be covered by executive privilege and not even be required to testify before Congress.³¹⁶ (Such an assertion has never been made by an operational manager whose offices are situated in the White House without congressional authorization, leaving previous arguments inapposite regarding “czars.”) Such senior advisers are immune because they are essentially alter egos of the President, as the Clinton Justice Department argued.³¹⁷ Therefore, as far as the law is concerned, when the President deliberates with such a senior adviser, he is essentially talking to himself.

Additionally, the Reagan Justice Department argued that executive branch officials who refuse to testify due to a presidential assertion of executive privilege cannot be prosecuted for contempt either by a federal prosecutor or Congress.³¹⁸ But immunity from criminal prosecution is one thing, whereas immunity from civil discovery pursuant to court order is another. Although the courts have not

³¹⁰ *INS v. Chadha*, 462 U.S. 919, 942-43 (1983).

³¹¹ *Miers*, 558 F. Supp. 2d at 62.

³¹² *Id.* at 56.

³¹³ *Nixon v. Sirica*, 487 F.2d 700, 714 (D.C. Cir. 1973).

³¹⁴ *Clinton v. Jones*, 520 U.S. 681, 695 n.23, 696 (1997).

³¹⁵ *Miers*, 558 F. Supp. 2d at 58-59.

³¹⁶ HAROLD C. RELYEA, CONG. RESEARCH SERV., RL 31351, PRESIDENTIAL ADVISERS’ TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: AN OVERVIEW 27 (2004).

³¹⁷ Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. 1, 5 (1999).

³¹⁸ Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 140 n.42, 142 (1984).

definitively spoken on the question, the Clinton Justice Department considered the question. “Subjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions.”³¹⁹ The Justice Department under President George W. Bush adopted that position verbatim.³²⁰

The Supreme Court has held that the President is absolutely immune from damages for his official actions,³²¹ while holding that top White House advisers only enjoy qualified immunity from damages for their official actions.³²² This does not dispositively prove that such presidential advisers do not share presidential immunity from testifying, as there may be a rationale for fully transferring presidential protection regarding deliberations but not regarding damages, but it nonetheless cuts against the idea of presidential advisers wielding comprehensive protection against compelled testimony.³²³ Although there is now a D.C. District precedent that such aides do not enjoy comprehensive protection,³²⁴ the question remains open for the D.C. Circuit and the Supreme Court.

Finally, the White House argues that courts should not decide these claims because adjudication “would inexorably alter the separation of powers and forever change how the political branches deal with each other.”³²⁵ That argument fails for the reasons set forth in Part V.B below.

B. Superior Alternative Approach for the Recent Controversies

The courts should not accept either set of arguments. The courts should reject White House contentions that executive-privilege claims are not justiciable, finding instead that under circumstances such as those described in *Miers*, Congress has standing and such assertions of privilege are also in all other respects justiciable. The courts should thus reach the merits of the case. In reaching the merits, the courts should reject Congress’s arguments when senior White House advisers are conversing with the President on his express constitutional powers, not limited to commander-in-chief. But as the other factors considered above are introduced, such as matters involving so-called czars that exercise executive authority without express congressional authorization, Congress should start to be able to overcome assertions of privilege and perform congressional oversight duties.

The D.C. Circuit has determined that “the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a

³¹⁹ Assertion of Exec. Privilege with Respect to Clemency Decision, 23 Op. O.L.C. at 5.

³²⁰ See Immunity of Former Counsel to the President from Compelled Cong. Testimony, 31 Op. O.L.C. 1, 3 (2007).

³²¹ Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

³²² Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

³²³ Though it is possible that such absolute immunity does extend if the subject matter concerns military or national security issues. *Id.* at 812 (dictum) (distinguishing immunity for “national security or foreign policy” from immunity for all actions generally).

³²⁴ Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 105-06 (D.D.C. 2008).

³²⁵ Reply in Supp. of Defs.’ Mot. to Dismiss at 35, *Miers*, 558 F. Supp. 2d 53 (No. 1:08-cv-00409).

constructive *modus vivendi*, which positively promotes the functioning of our system.”³²⁶ Such opportunities may arise in the coming years. The courts should issue a clear ruling that conversations between the President and members of his advisory White House staff concerning the exercise of an Article II power expressly granted to the President are privileged, and it is difficult to posit a justification so compelling that it could override the President’s interest in confidentiality. But in many other circumstances such confidentiality becomes less central to the constitutional scheme, and eventually tips in favor of Congress as the people’s representatives to hold the President accountable.

The judiciary should apply the rationale employed by the *Gravel* Court to White House advisers,³²⁷ so long as those advisers are truly advisory, as they serve in the White House Office in the same fashion that congressional staffers serve in the members’ offices. Both act as alter egos of the elected official in whose office they serve. In the alternative, White House staff of senior rank should be held alter egos of the President regarding presidential action. Even more narrowly, such staff could alternatively be found to be alter egos when they are conversing with the President. At a minimum, White House aides of senior rank should be considered alter egos of the President regarding conversations they have directly with the President if those conversations concern the President’s use of an Article II power, as such conversations go to the core exercise of the President’s power by conferring with extensions of his constitutional office regarding the discharge of his constitutional functions. The courts could even narrow such a holding further yet, by limiting its scope to situations where there is no substantial showing of criminal wrongdoing. This would obviously not help in situations where credible criminal allegations are implicated. Such a provision would leave intact the case law from the Watergate era, while reducing the likelihood of threats of litigation springing from unrelenting and unending investigations of the executive branch during times of heightened partisan tension.

The courts should attach special importance to presidential deliberations regarding an Article II power. The brevity of Article II’s text leaves a great deal open to inference and interpretation. Executive orders that carry the force of law but that codify policy in a manner similar to statutes raise questions as to the limits of unilateral executive policymaking. The President entering into executive agreements with other nations,³²⁸ without either submitting the agreement to the Senate as a treaty that requires a two-thirds vote for ratification,³²⁹ aggressively asserts the President’s foreign policy powers. Certainly there are aspects of the modern administrative state that can raise those concerns. But there are also core powers committed to the President—and to him alone—by the Constitution. Although the

³²⁶ *AT&T II*, 567 F.2d 121, 130 (D.C. Cir. 1977).

³²⁷ *See Gravel v. United States*, 408 U.S. 606 (1972).

³²⁸ *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (regarding President Carter entering into an agreement with Iran to suspend legal claims by Americans against Iranian assets).

³²⁹ U.S. CONST. art. II, § 2, cl. 2.

Court has at times not focused on that fact as a rigid basis for decision,³³⁰ a growing emphasis on textualism in recent years should lead to a robust protection of the President's confidentiality in discussing express Article II actions with his senior advisory staff, just as this emphasis might call for a reexamination of various other areas of recent government practice that might be at odds with the constitutional framework.

Only one rationale is obvious as to why the White House would not advocate for this position and instead encourage the court to not reach the merits of the case: the White House is not confident it would receive an outcome better than the status quo. The White House is concerned that in addressing the merits of executive privilege cases, the judiciary will allow for a requirement that the White House senior staff to provide at least some information. Alternatively, the White House could fear that the courts would fashion a new framework or rule of law, and this framework could be even less desirable to the White House than the status quo. Or perhaps the White House would be compelled to provide the information to a judge for an *in camera* inspection for the judge to determine what is privileged. Thus, in the spirit of the popular axiom of "better the devil you know," the White House would rather the courts not engage in executive privilege.

But this approach is mistaken. Recent lawsuits over executive privilege have become acrimonious and degrade relations between the political branches. If not clearly resolved by the judiciary, such suits will only encourage more litigation to the point that it would become a tiresome next step that could be expected whenever a future President attempts to assert confidentiality. By reaching the merits of a case involving these controversies, the courts can restore appropriate balance of protection for presidential deliberations with Congress's need for information to perform oversight, regardless of party. This could in turn help generate goodwill between the political branches essential for optimal interbranch relations as contemplated by the Constitution's tripartite framework.

The lawsuits discussed in this Article from the George W. Bush presidency were a continuation of various cases litigated during the Clinton presidency. The same could now happen with the Obama presidency. These overlapping scandals eroded executive privilege.³³¹ The Court rejected any "protective function privilege" for Secret Service agents that until that point had been theorized as an aspect of executive privilege.³³² White House staff protections—including executive privileges involving the White House Counsel's Office—were diminished.³³³ Commenting on the narrowing of executive privilege, Professor Turley expressed concern as to how these cases weakened the presidency.³³⁴ To be fair, two distinctive differences between Clinton's assertions of executive privilege and those of earlier administrations were that Clinton freely asserted the privilege and did so

³³⁰ See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (rejecting arguments that having a prosecutor, such as an Independent Counsel, asserting executive power independently of the President violates Article II).

³³¹ Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205, 206 (2001).

³³² *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998).

³³³ See *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

³³⁴ Turley, *supra* note 331, at 206-07.

even for unofficial matters, whereas prior Presidents were reluctant to assert it and even then did so only regarding official actions.³³⁵ Professors Jonathan Turley and Nelson Lund credit part of this damage to Bernard Nussbaum, Clinton's first White House counsel, for failing to maintain proper boundaries between President Clinton's official activities versus private activities by working on matters that stemmed from the President's personal matters.³³⁶ This left the courts to draw lines excluding such private activities from executive-privilege protection. But they were nonetheless executive privilege cases. And the defeat of several executive-privilege assertions by President Clinton saddled future administrations with a disadvantage against congressional investigators.³³⁷

Such controversies, if they bear fruit for an opposition Congress, will only continue this aggravation between the branches and further embolden a Congress controlled by the opposition party to push the envelope on investigatory limits. Even if no illegalities are involved, it is "inherent in the nature of presidential communications that they often could prove embarrassing if publicly released: that is a fundamental reason for the very existence of the privilege."³³⁸

Of course, when Congress is entitled to the information in question, then aggressive congressional action ought to result in the acquisition of the sought-after material. And all this plays out on a political stage, where both the President and his congressional opponents choose to tackle the rigorous challenges of political life in our democratic system. It should be no surprise to any student of American politics that "[a] President's political adversaries can be expected to seek presidential communications and executive branch deliberative information for the very reason that public disclosure might prove embarrassing to the President."³³⁹

C. All Three Government Branches—Including Congress—Will Benefit from not Allowing Congress to Be Involved with Executive Branch Appointment Decisions

It would go without saying—except that it must be said in a law review article—that a correct application of executive privilege in a case such as *Miers* would benefit the executive branch. Upholding executive privilege, as this Article advocates, would strengthen the position of the President vis-à-vis Congress, by making confidential private conversations with White House advisory officials regarding how the President should use his appointment power. What is less likely to be considered—but equally true—is that the judiciary will benefit as well, as will Congress.

The benefit to the judiciary is obvious. If the courts do not welcome such suits that require consideration of individualized assertions of executive privilege, the D.C. District and D.C. Circuit do not run the risk of regularly facing cases that require extensive discovery into executive branch conversations, each of which must

³³⁵ *Id.* at 208.

³³⁶ *Id.* at 225-26 & n.85 (citing Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 18 (1995) (citing criticism by two former White House counsel regarding the impropriety of Nussbaum's actions)).

³³⁷ *Id.* at 210.

³³⁸ Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1134 (1999).

³³⁹ *Id.* at 1134.

go through a number of stages before it can be considered by a court. Furthermore, each would then require a detailed process with the presiding judge determining which parts, if any, are covered by executive privilege, and such determinations could constitute complex fact patterns. Upholding clear executive privilege rules that do not require frequent judicial involvement would minimize courts' decision costs, conserving scarce judicial resources.

The alternative, allowing suits to proceed in a manner that requires substantial judicial involvement, would be a burden to the courts. If a court allows a subpoena requiring a presidential adviser to appear to be enforced—leaving executive privilege to be asserted on a per-question basis during the course of the committee hearing—the only way a federal judge can then rule on the propriety of any given assertion of the privilege is after (1) the official refuses to answer on the grounds that the answer is privileged, (2) the chairman rejects the assertion and orders the witness to answer, (3) the official flatly refuses to comply, (4) the chairman finds the official in contempt, (5) the full committee votes (possibly along party lines) to sustain the chairman's finding, (6) the matter is referred to the full House, (7) the full body votes for a contempt citation, (8) the Speaker certifies the contempt citation and refers it to federal prosecutors, (9) the Justice Department declines to prosecute, (10) the House authorizes a civil suit, (11) the authorized member of the House files suit, and (12) the parties argue before a federal judge whether executive privilege was properly asserted. After the assertion, the judge (13) conducts an *in camera* inspection, (14) gives the executive an opportunity to submit more specified claims if certain material is not considered privileged, and then (15) supervises the release of whatever is still held not to be privileged. That is quite a burden for each assertion of privilege. And that burden should serve to discourage unnecessary litigation.

Thus, courts should be reluctant to address claims between the coequal political branches, because leaving the branches to work out differences “positively promotes the functioning of our [constitutional] system.”³⁴⁰ The Constitution “contemplates a more restricted role for Article III courts” in resolving interbranch disputes.³⁴¹ But there must be limits to such reluctance. Leaving disputes to the political branches for resolution works—except when it doesn't. And then what? Once one or both branches escalate a situation into one that impairs the proper functioning of one or both branches, then the courts should restore the proper constitutional balance if the controversy turns on a constitutional question, as it does regarding executive privilege.

The less obvious benefit is that such a holding would also benefit Congress. The “Pottery Barn Rule,” as Secretary of State Colin Powell articulated it regarding the U.S. decision to go to war with Iraq, was “You break it, you own it.”³⁴² With action comes responsibility. Tort law includes the rule that, absent a special relationship, a person owes no duty to act for the benefit of another, but if they choose to act, they

³⁴⁰ *AT&T II*, 567 F.2d 121, 130 (D.C. Cir. 1977).

³⁴¹ *Raines v. Byrd*, 521 U.S. 811, 828 (1997).

³⁴² See William Safire, *Language: You break it, you own it, you fix it*, N.Y. TIMES, Oct. 18, 2004, <http://www.nytimes.com/2004/10/17/arts/17iht-saf18.html>.

will then be held accountable if they act negligently.³⁴³ The same holds true for elected leaders. If an elected official has no hand in an action that goes awry, then the public usually gives him a free hand to condemn it. But if the elected leader has knowledge of a matter, then often he will be held to account by the electorate for his use (or lack thereof) of that knowledge and can suffer consequences if matters concerning that knowledge go badly.

Congress should be reluctant to welcome this level of accountability. Looking at the *Miers* case, if Congress insists on being able to access presidential deliberations on appointments, Congress will share accountability with the President when one of those appointees fails. The President makes approximately six thousand appointments through the White House Office of Presidential Personnel.³⁴⁴ This includes appointing 94 U.S. attorneys,³⁴⁵ the political office at the center of the *Miers* case. A U.S. attorney's office typically requires forty to eighty employees.³⁴⁶ Another entity dealing with staffing, the White House Office of Personnel Management, had a budget of over \$331 million in Fiscal Year 2008.³⁴⁷ In order to protect its own interests, Congress would have to conduct due diligence into many applicants to assess whether that person poses a risk of not performing his duties well. As such possibly-problematic appointees are identified, Congress must lodge objections with the White House against the appointment. In order to conduct such due diligence, Congress would have to create its own staff to conduct its own investigations. There would doubtless be redundancies between various oversight committees, as each committee could have different criteria for suspect nominees. And individual members may also want a staff person specifically dedicated to White House appointments, as any member may be unwilling to place his political interests in the hands of the committee chairman's vetting team. Congress would be much better served by not engaging in that process at all and preserving its ability to simply condemn the White House for incompetence whenever a presidential appointee embarrasses the administration.

The Senate shares accountability for performance, but not for the decision to appoint. In confirmation, the Senate determines whether the nominee is fit for the office. It does not inquire into what conversations the President had or what considerations motivated him to put forward that particular nominee. Therefore, neither house of Congress has dealt with this level of accountability to date.

Yet on countless other issues, congressional oversight is extremely important to hold an administration to account and thereby encourages the executive branch to focus its efforts on faithfully serving the American people through a conscientious performance of administrative duties. Those who hold congressional office have

³⁴³ RESTATEMENT (SECOND) OF TORTS §§ 314, 321-22 (1965); see *Stockberger v. United States*, 332 F.3d 479 (7th Cir. 2003) (Posner, J.) (explaining the rationale for the nonfeasance rule).

³⁴⁴ Bradley H. Patterson & James M. Pfiffner, *The White House Office of Presidential Personnel*, 31 PRESIDENTIAL STUD. Q. 415, 420 (2003).

³⁴⁵ *Id.* at 416.

³⁴⁶ See Brian Friel, *Most Bush administration applicants file resumes online*, GOVERNMENT EXECUTIVE.COM, Mar. 30, 2001, <http://www.govexec.com/dailyfed/0301/033001b1.htm>.

³⁴⁷ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE OFFICE OF PERSONNEL MANAGEMENT, FISCAL YEAR 2011 (2010).

taken an office that is demanding; thus, members of Congress must exercise appropriate oversight regardless of political risk.

VI. CONCLUSION

Most controversies between Congress and the White House over information are decided more by politics than by law, and so a settlement is usually reached favoring the party with the public wind to its back.³⁴⁸ Questions of law should not be decided in that fashion. Therefore, the reach and scope of executive privilege should be settled by the courts in such situations, so that the President's power is not impaired whenever the political wind is in the President's face and at his opponents' backs, or the President is inappropriately shielded when political tides flow in his favor.

While the best outcome in any interbranch dispute is the political branches reaching a settlement, "such compromise may not always be available, or even desirable."³⁴⁹ It is not desirable where it sets a precedent that degrades one of the three branches of government. If one branch of government demands something to which it is not constitutionally entitled and that the Constitution has fully vested in a coequal branch, the vested branch should not be required to negotiate on the question. Negotiation usually involves compromise. This negotiation would often result in one branch needing to cede to the other, encouraging additional unconstitutional demands in the future. Though this may perhaps be a quicker route to a resolution, it disrupts the constitutional balance in government. As the Supreme Court has recently explained, "'convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'"³⁵⁰

President Reagan declared that "you aren't President; you are temporarily custodian of an institution, the Presidency. And you don't have any right to do away with any of the prerogatives of that institution, and one of those is executive privilege. And this is what was being attacked by the Congress."³⁵¹ Thus, any White House has the obligation to fight to protect executive privilege, and the courts should draw the line to preserve that constitutional prerogative. Likewise, there are times when it is the President who is refusing to give Congress its due under the Constitution, where Congress must assert its prerogatives for future generations. Conversely, where confidentiality is not warranted, courts must ensure public disclosure and accountability.

³⁴⁸ See generally Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323 (2002).

³⁴⁹ Broughton, *supra* note 211, at 836.

³⁵⁰ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

³⁵¹ President Ronald Reagan, *Remarks and a Question-and-Answer Session with Reporters on Domestic and Foreign Policy Issues* (Mar. 11, 1983), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1983, at 389 (Office of the Federal Register 1984).